No. 89-683

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROBERT B. WATERHOUSE,

Petitioner,

—against—

RAMON J. RODRIGUEZ, Chairman of the New York State Board of Parole, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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October 23, 1989

QUESTIONS PRESENTED

1. Whether the Sixth Amendment right to counsel is violated when a criminal defendant is represented at the critical stage of the proceedings by a disbarred "attorney" and the grounds for disbarment were incompetence and dishonesty?

2. Whether Townsend v. Sain, 372 U.S. 293 (1963), requires a federal evidentiary hearing on the dispositive factual issue underlying a death row inmate's coerced confession claim when the factual issue was never decided in state court?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Robert B. Waterhouse and the respondents Ramon J. Rodriguez, chairman of the New York State Board of Parole, Robert Abrams, attorney general of the state of New York, Louie L. Wainwright, secretary of the Florida Department of Corrections, and R.L. Dugger, superintendent of the Florida State Prison.

The respondents before this Court include Robert Abrams, Louie L. Wainwright, and R.L. Dugger.

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Petitioner Robert B. Waterhouse respectfully prays for a Writ of Certiorari to review the dismissal of his Petition for Writ of Habeas Corpus by the United States Court of Appeals for the Second Circuit, entered July 24, 1989.

OPINIONS BELOW

The Summary Order of the United States Court of Appeals for the Second Circuit, affirming the dismissal of

Waterhouse's Petition for Writ of Habeas Corpus, is listed at 883 F.2d 1022; the text of the Summary Order is not reported and is reprinted as Appendix A. The Opinion of the District Court for the Eastern District of New York denying Waterhouse's petition based on his coerced confession claims is unreported and is reprinted as Appendix B. The Opinion of the United States Court of Appeals for the Second Circuit, reversing the judgment of the District Court regarding Waterhouse's Sixth Amendment claims and remanding for a determination of Waterhouse's coerced confession claims, is reported at 848 F.2d 375 and is reprinted as Appendix C. The Opinion of the District Court for the Eastern District of New York granting Waterhouse's petition based on his Sixth Amendment claims is reported at 660

F. Supp. 319 and is reprinted as Appendix D.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit, affirming the District Court's dismissal of Waterhouse's Petition for Writ of Habeas Corpus, was entered on July 24, 1989. This Court has jurisdiction to review the judgment below by Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

Section (1) of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Section 2254(d) of Title 28 of the United States Code provides in pertinent part:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of com-

petent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit--

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and

adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding.

STATEMENT OF THE CASE

Petitioner Robert B. Waterhouse is presently awaiting resentencing on death row in Florida. The Florida Attorney General has indicated that he will seek the death sentence during resentencing based in part upon the New York conviction under attack herein.

The New York conviction is constitutionally invalid under the Sixth Amendment because Waterhouse was represented during a critical stage of the proceedings against him by an attorney who had been disbarred for incompetence and dishonesty. Mr. Waterhouse prays for a writ of certiorari to review the New York conviction and to vindicate his Sixth

Amendment right to be represented by licensed counsel. Certainly, in a civilized society, a man should not be put to death when he was represented by counsel disbarred for incompetence and dishonesty.

The issue of what to do with a criminal defendant who has been represented by unlicensed or disbarred counsel has arisen with unfortunate frequency in the United States. The majority of decisions addressing the issue -- including an earlier panel decision by the Second Circuit, the District of Columbia Circuit, and the highest courts of two states -- hold that representation by unlicensed or disbarred counsel is tantamount to denial of counsel, and any conviction must be overturned, per se, without any further inquiry into harmless error.[1] A minority

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1 Solina v. United States, 709 F.2d 160 (2d Cir. 1983); Harrison v. United (continued...)

of decisions, including the Second Circuit's decision in this case and a decision of the Ninth Circuit, hold that even if a criminal defendant is represented by unlicensed or disbarred counsel, he must still make yet another showing of prejudice beyond the denial of counsel.[2]

1(...continued)
States, 387 F.2d 203 (D.C. Cir. 1967), rev'd on other grounds, 392 U.S. 219 (1968); People v. Felder, 47 N.Y.2d 287, 391 N.E.2d 1274 (1979); Seattle v. Ratliff, 100 Wash.2d 212, 667 P.2d 630 (1983) (en banc); see Hucklebury v. Florida, 337 So.2d 400 (Fla. Dist. Ct. App. 1976); People v. Williams, 140 Misc. 2d 136, 530 N.Y.S.2d 472 (Sup. Ct. Queens County 1988).

2 In addition to the decision in this case, see United States v. Mouzin, 785 F.2d 682 (9th Cir.), cert. denied, 479 U.S. 985 (1986); see McKeldin v. Rose, 631 F.2d 458 (6th Cir. 1980), cert. denied, 450 U.S. 969 (1981); Pennsylvania v. Vance, 546 A.2d 632 (Pa. Super. Ct. 1988), appeal denied, 557 A.2d 723 (Pa. 1989).

This case presents the Court with an opportunity to resolve this conflict which, regrettably, is likely to recur.

The New York conviction also must fall because the courts below refused to provide the required evidentiary hearing on a determinative fact underlying his coerced confession claim -- i.e., whether Waterhouse was interrogated by police for 2 hours while stripped naked on a metal chair. This factual allegation was raised by Waterhouse in state court, but was not addressed by the state court judge.

A. Statement Of The Facts

The most critical stage of the New York proceedings against Waterhouse was a "Huntley" hearing, see People v. Huntley, 15 N.Y.2d 72, 255 N.Y.S.2d 838, 204 N.E.2d 179 (1965), concerning the admissibility of Waterhouse's confession. Waterhouse was represented at the Huntley hearing by Mr.

Edward LaFreniere. LaFreniere called no witness other than Waterhouse, although potential witnesses were present who could have testified concerning relevant issues.

"[E]ffective November 15, 1966" -- the second day of Waterhouse's Huntley hearing -- LaFreniere was disbarred for incompetence and dishonesty. The precise grounds for disbarment were that LaFreniere accepted fees on at least ten separate occasions either without making any efforts on behalf of his client or with making only token efforts. LaFreniere was also found to have stolen his client's funds.[3] See Suffolk County Bar Ass'n v. LaFreniere, 26

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3 The order of disbarment recited that LaFreniere, inter alia, had taken money as an escrowee and failed to account for the missing balance and had promised to pay a client's hospital bill out of the client's settlement fund but failed to pay the bill or forward the settlement money to the client.

A.D.2d 946, 946-48 (2d Dep't 1966), appeal dismissed, 19 N.Y.2d 809 (1967).

Although no longer licensed to practice law, LaFreniere continued to represent Waterhouse through the Huntley proceedings on November 15, 1966. Those proceedings, which were critical to the ultimate disposition of the suppression hearing, included (a) a portion of the State's cross-examination of Waterhouse, (b) LaFreniere's decision not to conduct a redirect examination of Waterhouse, (c) LaFreniere's failure to call witnesses who would have corroborated Waterhouse's testimony, and (d) the State's rebuttal examination and LaFreniere's cross-examination of two police officers who had testified the day before but were recalled in an attempt to rebut certain of Waterhouse's testimony, including his

statements that he was interrogated while stripped naked.

It is undisputed that Waterhouse did not know of LaFreniere's disbarment while these crucial proceedings were taking place.

1. Waterhouse's Arrest And Interrogation

During the evening of February 11, 1966, Waterhouse had visited several bars in Greenport, New York and returned home in an intoxicated condition. (2d Cir. A-125.)[4] When he arrived home, Mr. Kenneth Norwood, who was a friend of Waterhouse's foster parents and lived in the same house, told Waterhouse that the police had been by the house and wished to speak with him. (2d Cir. A-126.) Although there was no arrest warrant issued for Waterhouse at

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4 Citations in the form "2d Cir. A-__" are to the Joint Appendix filed in the Court of Appeals on May 8, 1989.

this time, and even though neither Norwood nor Waterhouse was aware of the reasons for the inquiry by the police, Waterhouse immediately and voluntarily went to the Greenport Village police station.

Waterhouse, accompanied by Norwood, arrived at the police station at or about 2:00 A.M. on February 12, 1966. (2d Cir. A-149.) Although Norwood asked to remain with Waterhouse because of the latter's intoxication, the police officers told Norwood he had to leave. Detective Sergeant Raymond Kowalski and Detective Carl Grothe then escorted Waterhouse to a small detention room, where they commenced an interrogation regarding the homicide of Mrs. Ella Mae Carter on the prior night. There is disputed evidence whether the police advised Waterhouse of his Miranda rights, whether Waterhouse requested counsel, and whether Waterhouse was

threatened with bodily harm. It is undisputed that no attorney was present during Waterhouse's questioning.

At or about 3:00 A.M., after an hour of interrogation, the detectives decided to take Waterhouse to another police station for the remainder of the interrogation. This was done, according to the detectives' own admission, to hide their interrogation from scrutiny, because there "were too many people around . . . looking in the windows" of the Greenport police station. (2d Cir. A-10.) Sergeant Spencer drove Waterhouse and Detectives Grothe and Kowalski, arriving at the police station at about 3:35 A.M.

Waterhouse testified that he was then taken to an interrogation room, was forced to strip naked, and was denied permission to speak with an attorney or his family. The interrogation then continued, with

Waterhouse forced to answer questions while seated naked on a metal chair. (2d Cir. A-110 to -112, -119.)

At approximately 6:00 A.M., after being interrogated for nearly four hours (two and one-half hours of which naked), Waterhouse signed a statement prepared by the police officers admitting that he was at the scene of the crime on the night of the murder -- but not that he committed the murder. (See 2d Cir. A-1.) Only then was Waterhouse allowed to get dressed.

Assuming that the police interrogation tactics were constitutionally improper, it is undisputed that such was prejudicial. The prosecuting attorney conceded at trial that this "confession" was the only significant evidence connecting Waterhouse to the crime charged. (Tr. 485.)[5]

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5 Citations in the form "Tr. ___" are to the transcript of Waterhouse's March

(continued...)

2. The New York State Proceedings

Waterhouse was indicted for murder in the first degree and burglary in the second degree on April 1, 1966. On April 15, 1966, Waterhouse entered a plea of not guilty to the indictment.

The Huntley hearing, before Suffolk County Court Judge George F.X. McInerney, began on November 14, 1966 with the prosecution presenting the testimony of the four police officers who interacted with Waterhouse on the night of the interrogation. Although each officer was methodically questioned concerning the events on the night of the interrogation, each failed to testify on the prosecution's case that Waterhouse was forced to strip during the interrogation. After the State rested, Waterhouse testified, inter alia,

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5(...continued)
1967 trial.

that the police forced him to strip upon entering the second interrogation room and interrogated him while naked for 2 hours, until he ultimately agreed to sign a "confession" prepared by the police. Only then, on rebuttal, did the prosecution recall one of the officers who then "remembered" that Waterhouse was forced to undress for inspection during the interrogation but was only naked for "about five minutes."

At the conclusion of the Huntley hearing, Judge McInerney found "as a matter of law that the defendant knowingly, intelligently and voluntarily waived his rights and the statement is admissible." (See B-11 to -13.) However, Judge McInerney did not make a factual determination as to the length of time Waterhouse was naked while interrogated, finding only that Waterhouse "was undressed for

physical inspection and the presence of a laceration on the inside of his left thigh was noticed." Thus, it is unclear whether Judge McInerney focused on Waterhouse's claim that he was interrogated for a substantial period while naked and, if so, the legal standard he applied to the claim.

A mistrial was declared after the conclusion of the Huntley hearing because of LaFreniere's disbarment. It is not clear from the record how -- or when -- the Court first learned of the disbarment. Subsequently, Mr. Harry R. Brown was assigned as Waterhouse's counsel.

On March 8, 1967, at the beginning of Waterhouse's trial, Brown made several oral motions for a new Huntley hearing. Brown advised the Court that LaFreniere did not do a competent job during the Huntley hearing because LaFreniere failed to call witnesses who "would have established the

fact that this statement that alleged was given was not given voluntarily." (Tr. 196.) Significantly, LaFreniere's disbarment was based in part upon his past history of failing to competently represent his clients.

Nevertheless, the motions for a new Huntley hearing were denied on the sole ground that a Huntley hearing had already been held -- despite the fact that Waterhouse was represented by a disbarred attorney during a part of that hearing and despite Brown's contention that Waterhouse's "constitutional rights have been violated."

Faced with the fact that his "confession" would be admitted into evidence, Waterhouse was counselled by Brown to accept the prosecutor's offer to allow a plea of guilty to second degree murder (Waterhouse had been charged with first

degree murder and burglary). That plea was entered on March 13, 1967. On April 28, 1967, Waterhouse was sentenced to a term of not less than 20 years nor more than the duration of his natural life.

On April 29, 1969, Waterhouse filed an application in state court for a writ of Error Coram Nobis. On September 3, 1969, the application was granted, and a hearing held on October 29, 1969. At that time, the Suffolk County Court vacated the sentence imposed on April 28, 1967, and then imposed the exact same sentence on Waterhouse, nunc pro tunc as of April 28, 1967. This judgment was affirmed, without opinion, by the Appellate Division, Second Department, of the New York State Supreme Court on March 13, 1972, People v. Waterhouse, 38 A.D.2d 1010, 331 N.Y.S.2d 372 (2d Dep't 1972), which decision was affirmed, without opinion, by the New York State

Court of Appeals on October 7, 1974, People v. Waterhouse, 35 N.Y.2d 688, 361 N.Y.S.2d 160, 319 N.E.2d 422 (1974).

B. Subsequent Proceedings

Waterhouse was paroled under the New York conviction on October 29, 1975. Waterhouse is presently incarcerated in the State of Florida and is subject to incarceration in New York for violation of parole under the New York conviction. New York Violation of Parole Warrant number 67531 was issued for Waterhouse on January 10, 1980, and is presently on file in Florida as an additional detainer. On February 17, 1983, the Supreme Court of the State of Florida affirmed a conviction of murder in the first degree and the imposition of the death penalty. Waterhouse v. State, 429 So.2d 301 (Fla.), cert. denied, 464 U.S. 977 (1983). The New York conviction was relied upon in two respects as

aggravating circumstances justifying the death penalty. 429 So.2d at 306.

The death sentence was recently vacated pursuant to a Florida State habeas petition, and the case remanded for resentencing. Waterhouse v. State, 522 So.2d 341 (Fla.), cert. denied, Dugger v. Waterhouse, 109 S. Ct. 178 (1988). The resentencing proceeding is presently scheduled to commence on November 14, 1989. The Florida attorney general has indicated that he will seek the death sentence at the resentencing, based in part upon the New York conviction.

C. Waterhouse's Habeas Petition

On December 19, 1986, Waterhouse filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of New York, seeking vacatur of the New York conviction. Two grounds are relevant to this proceeding.

First, the petition argued that, because Waterhouse was represented by a disbarred attorney during a crucial stage of the proceedings, he was denied the effective assistance of licensed counsel, in violation of the Sixth Amendment. Second, the habeas petition contended that Waterhouse's conviction was obtained through the use of a coerced confession in violation of the Fifth, Sixth, and Fourteenth Amendments.

1. **Waterhouse's Sixth Amendment Claim**

The District Court initially granted the petition, and vacated the New York conviction, based upon Waterhouse's contention that LaFreniere's disbarment and continued representation during the Huntley hearing violated the Sixth Amendment. Waterhouse v. Rodriguez, 660 F. Supp. 319 (E.D.N.Y. 1987) (D-1). The District Court, relying upon decisions of the Second and District of Columbia Circuits, and recog-

nizing a contrary decision from the Ninth Circuit, determined that the Sixth Amendment right to the assistance of counsel "could mean no less than 'representation by a licensed practitioner.'" (D-14.) Finding that LaFreniere was not a licensed attorney when he represented Waterhouse on the second day of the Huntley hearing, and relying on decisions of this Court that require a per se rule when a criminal defendant was denied counsel, see Pope v. Illinois, 481 U.S. 497 (1987); Rose v. Clark, 478 U.S. 570 (1986), the District Court granted Waterhouse's habeas petition and vacated his New York conviction. The District Court did not decide Waterhouse's other claims for relief.

However, the Court of Appeals for the Second Circuit reversed that decision and remanded to the District Court for consideration of the remainder of Waterhouse's

petition, including his coerced confession claim. Waterhouse v. Rodriguez, 848 F.2d 375 (2d Cir. 1988). Although the Court of Appeals acknowledged explicit language in Johnson v. Zerbst, 304 U.S. 458 (1938), holding that a court is without jurisdiction when a criminal defendant is denied counsel, it divined instead an "alternative rationale," which required Waterhouse to show that LaFreniere was faced with a "conflict of interest" that affected his representation. Based upon this alternative rationale, the Court of Appeals determined that a per se rule should not apply here because LaFreniere was not faced with a conflict of interest. This was so, according to the Court of Appeals, because "he ceased representation of Waterhouse immediately after learning of the disbarment." (C-34.) The Court of Appeals did not cite any portion of the

record for its factual determination that LaFreniere did not know of his disbarment during the Huntley hearing or that he withdrew immediately upon being advised of his disbarment. In fact, the Court of Appeals' "finding" is sheer speculation, as there is nothing in the record to support such a hypothesis. Significantly, the District Court did not make a factual determination of when LaFreniere learned of his disbarment, since it was irrelevant to its analysis.

Waterhouse filed a timely petition for rehearing and rehearing in banc, which challenged the basis of an alternative rationale and requested, in the alternative, remand to the District Court for an evidentiary hearing regarding the newly dispositive -- and not previously determined -- factual issue of when LaFreniere learned of his disbarment. This petition

was denied, without opinion, on August 8, 1988.

2. Waterhouse's Coerced Confession Claim

On remand, Waterhouse moved pursuant to Rule 8 of the Rules Governing 28 U.S.C. Section 2254 Cases for an evidentiary hearing regarding his claim that the February 12, 1966 confession was coerced. On February 16, 1989, the District Court entered a Memorandum and Order denying Waterhouse's motion for an evidentiary hearing and dismissing Waterhouse's habeas petition. The District Court denied Waterhouse's motion for an evidentiary hearing even though the court conceded that "Judge McInerney did not make a determination as to the amount of time [Waterhouse] remained naked" (B-27), and even though such could not be reconstructed on "the record before this court." (B-43.) Next, the District Court, presuming Judge

McInerney's factual conclusions to be correct (while conceding that certain factual determinations were not even made), decided that Waterhouse's confession was not coerced. The District Court thus dismissed Waterhouse's habeas petition.

On July 24, 1989, the Court of Appeals for the Second Circuit, in a summary order, affirmed the District Court's dismissal of the petition. The Court of Appeals also conceded that Judge McInerney failed to state how long Waterhouse was naked, yet nonetheless found Waterhouse's request for an evidentiary hearing on that issue to be meritless. The Court of Appeals relied on an "assumption" that, had Judge McInerney believed Waterhouse, he would have suppressed Waterhouse's confession. (A-3.)

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEAL'S SIXTH AMENDMENT DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT, NULLIFIES A FUNDAMENTAL RIGHT, AND IS IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS AND HIGHEST STATE COURTS

A. The Decision Below Conflicts With This Court's Decisions On The Right To Counsel -- The Most Fundamental Right In Our System Of Criminal Justice

The Court of Appeals' decision impinges upon a right long considered fundamental under the United States Constitution. It is axiomatic that the Sixth Amendment guarantees the right of an accused to an attorney at each critical stage of the prosecution.[6] As this Court

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6 There can be no doubt that the Huntley hearing was such a critical stage and that Waterhouse's Sixth Amendment right to counsel had already attached by the time of that hearing. The Huntley hearing ruled on, in the district attorney's words, the only significant evidence connecting Waterhouse to the crime. Certainly, the Huntley hearing -- coming after the arraignment and just prior to the

(continued...)

declared in Glasser v. United States, 315 U.S. 60 (1941):

> "[The Sixth Amendment right to counsel] is one of the safeguards determined necessary to insure fundamental human rights of life and liberty," and a federal court cannot constitutionally deprive an accused, whose life or liberty is at stake, of the assistance of counsel.

Id. at 70 (quoting Johnson v. Zerbst, 304 U.S. 458, 462 (1938)).

The right to counsel is not a legal formality or a mere nicety, but is one of the pillars of American jurisprudence. Indeed, the right to counsel is required because "the public conscience must be satisfied that fairness dominates the administration of justice." Adams v. McCann, 317 U.S. 269, 279 (1942). The

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6(...continued)
beginning of trial -- was within "the most critical period of the proceedings." See Powell v. Alabama, 287 U.S. 45, 57 (1932).

Court of Appeals' decision to condone representation by a disbarred lawyer flies directly in the face of "the widespread belief that lawyers in criminal courts are necessities, not luxuries." See Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

This Court has been unequivocal in the protection of this fundamental right, and has refused to apply a harmless error analysis, or to require a defendant to show any prejudice, where he has been denied representation by an attorney. See Glasser, 315 U.S. at 76; White v. Maryland, 373 U.S. 59, 60 (1963). This per se rule arises from the fact that, if the requirements of the Sixth Amendment are not complied with, "**the court no longer has jurisdiction to proceed. The judgement of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas**

corpus." Johnson v. Zerbst, 304 U.S. 458, 468 (1938) (emphasis added) (footnote omitted).

The Sixth Amendment right to counsel is only satisfied, absent waiver, when a criminal defendant is represented by a member of the bar. Thus, the guarantee of counsel necessarily requires representation by "an attorney admitted to practice law." United States v. Hoffman, 733 F.2d 596, 599 (9th Cir.), cert. denied, 469 U.S. 1039 (1984); see Wheat v. United States, 108 S. Ct. 1692, 1697 (1988).

The order of disbarment of LaFreniere was "effective November 15, 1966." There can be no doubt that, while disbarred, LaFreniere represented Waterhouse at a critical proceeding -- the Huntley hearing -- on November 15, 1966.[7] Under this

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7 The reasons for Mr. LaFreniere's disbarment were not merely technical. (continued...)

Court's pronouncements in Johnson v. Zerbst, Glasser v. United States and White v. Maryland, Judge McInerney's court was without jurisdiction to proceed with the Huntley hearing on that day -- and it was per se prejudicial error not to reopen the hearing when requested to do so by Waterhouse's new counsel. The New York conviction based upon the Huntley hearing is void.

The Court of Appeals, however, chose to ignore this Court's decisions. Instead,

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7(...continued)
LaFreniere was found to have represented clients incompetently on at least ten different occasions and to have stolen money from his clients. Significantly, Waterhouse's new attorney, Harry Brown, urged the New York court to reopen the Huntley hearing on the ground that LaFreniere had not called a crucial witness who would have corroborated Waterhouse's coerced confession claim -- a charge of laxness chillingly similar to the findings in the order of LaFreniere's disbarment.

it found -- without citation to any decisions of this Court -- an "alternative rationale" to that per se rule. According to the Court of Appeals, the per se rule applies only when disbarred counsel is faced with a "conflict of interest" that affected his representation. (C-32.) Finding that no such conflict of interest existed,[8] the Court refused to apply the per se rule even though the grounds for LaFreniere's disbarment were incompetence and dishonest.

The court below's refusal to apply the per se rule directly conflicts with this

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8 Waterhouse vigorously contends that, even if the Court of Appeals' "alternative rationale" is appropriate, LaFreniere was faced with a conflict of interest that rendered his assistance ineffective. As the District Court found, LaFreniere was in the midst of his disbarment proceedings and thus "had some incentive to represent his client with less vigor than the sixth amendment requires." (D-22.)

Court's decisions that harmless error is inapplicable where a criminal defendant is denied representation by licensed counsel. See, e.g., Glasser, 315 U.S. at 76; White v. Maryland, 373 U.S. at 60. If left standing, the decision will undermine public confidence in our system of justice, which is premised upon the Sixth Amendment guarantee of counsel -- which can have no other meaning than a licensed lawyer who has not been adjudged an incompetent and a thief. Review by this Court is necessary to correct this grievous error.

B. Certiorari Should Be Granted To Resolve A Conflict Among The Courts of Appeals And Highest State Courts

Instances where a criminal defendant is represented by unlicensed or disbarred counsel arise with distressing frequency in the reported decisions of our state and federal courts. Two radically different approaches have been taken by these

decisions: (1) a majority view holding that such representation is tantamount to an outright denial of counsel and therefore per se prejudicial; and (2) a minority view, embodied by the decision below, that denial of licensed counsel is not in and of itself sufficient to overturn a conviction. Certiorari should be granted to resolve this conflict in decisions.

The decision below is clearly in the minority. It directly conflicts with decisions of the D.C. Circuit, an earlier panel decision of the Second Circuit, and with the highest courts of New York and Washington. See Harrison v. United States, 387 F.2d 203 (D.C. Cir. 1967), rev'd on other grounds, 392 U.S. 219 (1968); Solina v. United States, 709 F.2d 160, 167 (2d Cir. 1983); People v. Felder, 47 N.Y.2d 287, 391 N.E.2d 1274 (1979); Seattle v.

Ratliff, 100 Wash.2d 212, 667 P.2d 630 (1983) (en banc).

On the other hand, the decision is consistent with a minority of court decisions, including the Ninth Circuit, which likewise has declined to apply a per se rule in a similar situation. United States v. Mouzin, 785 F.2d 682 (9th Cir.), cert. denied, 479 U.S. 985 (1986).

The lower state courts are similarly divided. Compare Hucklebury v. Florida, 337 F.2d 400 (Fla Dist. Ct. App. 1976) (defendant represented at plea negotiations by law school graduate not admitted to the bar denied effective assistance of counsel) and People v. Williams, 140 Misc. 2d 136, 530 N.Y.S.2d 472 (Sup. Ct. Queens County 1988) (per se rule where attorney subsequently disbarred) with Pennsylvania v. Vance, 546 A.2d 632 (Pa. Super. Ct.

1988) (no per se where defendant represented by disbarred attorney).

Representation by counsel who has been disbarred for incompetence and dishonesty goes to the heart of the integrity of our system of justice. It impinges upon the one right which, above all, is paramount to due process of law -- the right to be represented by counsel. Certiorari should be granted to resolve the conflict in judicial treatment of this recurring issue. That the issue is one of such fundamental importance, and that Mr. Waterhouse may be put to death if this matter is not reviewed, further compel the grant of certiorari.

C. The Decision Improperly Assumes LaFreniere Withdrew Immediately

The Court of Appeals decided that LaFreniere withdrew from his representation of Waterhouse "immediately after learning of the disbarment." However, that fact was

not determined by the District Court, and there is no support cited by the Court of Appeals or in the record for such a factual finding. Since that factual determination is dispositive under the Court of Appeals' analysis -- and because the District Court did not determine that fact -- Waterhouse requested a remand to the District Court for an evidentiary hearing on that issue in a petition for rehearing. The Second Circuit denied the petition without an opinion on August 8, 1988.

It is black letter law that the function of a court of appeals does not include making findings of fact that the trial court should have made. Especially where the factual issue is dispositive, this Court has recognized the "better practice" of remanding for "an initial disposition in the District Court after an evidentiary hearing." DeMarco v. United

States, 415 U.S. 449, 450 (1973) (per curiam).

Moreover, there is absolutely no record support for the Court of Appeal's finding -- and the court cites none. Simple justice requires that a human being not be put to death on the basis of a fact not determined by the District Court, and which the Court of Appeals cites no support for. Accordingly, because the alleged fact of LaFreniere's knowledge of his disbarment is dispositive under the Court of Appeals' holding, and because that fact was never determined by the District Court nor supported by record citation by the court below, review by this Court is warranted to require resolution of a decisive issue that may keep Waterhouse from being executed.

II. THE DECISION BELOW ALLOWS A MAN TO BE PUT TO DEATH WITHOUT A FINDING ON A DISPOSITIVE ISSUE

From the start -- the Huntley hearing -- Waterhouse has insisted that his "confession" was the direct result of being interrogated while stripped naked on a metal chair. Indeed, this was the central focus of his defense at the suppression hearing. The decision below concedes that Judge McInerney did not make an explicit factual determination of the amount of time Waterhouse was forced to be naked during the interrogation, and acknowledges that "the record before this court does not allow for a definitive finding as to the precise amount of time" that Waterhouse was naked.[9] (B-43.) Nonetheless, the decision

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9 Because the Court of Appeals affirmed in an unreported summary order for "substantially the reasons stated by the district court" (A-2), the District Court opinion is cited in (continued...)

below refused to order an evidentiary hearing on this one dispositive issue. That decision is in conflict with decisions of this Court and, unless corrected, will result in Waterhouse being executed without a court ever having decided this factual dispute.

This Court has stated that a "federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts." Townsend v. Sain, 372 U.S. 293, 312-13 (1963) (footnote omitted). The Townsend Court recognized that there "**cannot even be the semblance of a full and fair hearing unless the state court actually reached and decided the issues of fact tendered by the defendant.**" Id. at 313-14 (emphasis added). The Townsend Court then listed the

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9(...continued)
this section.

situations in which an evidentiary hearing is required, including when "the merits of the factual dispute were not resolved in the state hearing."[10]

Waterhouse was denied an evidentiary hearing on the admittedly dispositive (B-25) issue of how long he was interrogated while stripped naked. The decision below relies on an assumption that Judge McInerney could not have believed Waterhouse's assertions regarding the interrogation. After all, the Court of Appeals' logic goes, Judge McInerney could not possibly have believed Waterhouse and still found his confession voluntary.

But this rationale flies directly in the face of this Court's approach in Townsend. The Townsend Court stated that where, as here, the state fact-finder

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10 The Townsend list has since been codified at 28 U.S.C. § 2254(d).

failed to articulate both an explicit finding on a material fact and the constitutional standard he applied, a federal court is required to hold an evidentiary hearing because it "cannot exclude the possibility that the trial judge believed facts which showed a deprivation of constitutional rights and yet (erroneously) concluded that relief should be denied." 372 U.S. at 315-16. In Townsend, a state habeas petitioner argued that his confession should be suppressed because it was induced through the injection of a truth serum. Id. at 304-05. The habeas petitioner had made the same claim in state court, which held the confession to be voluntary but made no express findings. Id. at 320. Without an express finding on whether a truth serum was administered, and absent a statement of the constitutional standard applied, the

Townsend Court remanded because a hearing was "obliged." Id. at 322.

It is difficult to imagine a state of facts more coercive in an interrogation than the injection of a truth serum; nonetheless, this Court refused to "assume" that the state judge did not believe the defendant and instead remanded for a "required" hearing. To the contrary, if the Court of Appeals' analysis were applied to the Townsend facts, no hearing would be held because the state court trier of fact could not possibly have believed Townsend and yet found the confession voluntary. That is directly contrary to the holding in Townsend, but that is exactly what the Court of Appeals has decided here.

Accordingly, the Court of Appeals' decision will allow Waterhouse to be executed "without the semblance of a full and fair hearing" because it has refused to

direct, as required by decisions of this Court, that an evidentiary hearing be conducted on the dispositive issue concerning Waterhouse's confession.

CONCLUSION

For the foregoing reasons, we respectfully request that a writ of certiorari be issued to the United States Court of Appeals for the Second Circuit.

Dated: October 23, 1989

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 24th day of July, one thousand nine hundred and eighty-nine.

Present:

Honorable Ralph K. Winter,
Honorable Daniel J. Mahoney,
Circuit Judges,
Honorable Edward D. Re,[1]
Judge.

ROBERT B. WATERHOUSE, New York Parole Number AU600100, Florida State Prison Inmate Number 075376,

Petitioner-Appellant,

-against-

ORDER
89-2111

RAMON J. RODRIGUEZ, Chairman of the New York State Board of Parole, et al.,

Respondents-Appellees.

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1 Honorable Edward D. Re, Chief Judge, United States Court of International Trade, sitting by designation.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

We affirm for substantially the reasons stated by the district court.

Appellant's claim that he was entitled to an evidentiary hearing is without merit. "If the state court has decided the merits of the claim but has made no express findings, it may still be possible for the District Court to reconstruct the findings of the state trier of fact . . . ." Townsend v. Sain, 372 U.S. 293, 314 (1963). The district court did exactly that in the instant matter. It reconstructed, from the record, a finding by the state judge, based on police testimony before that judge, as

to the amount of time Waterhouse spent naked. Indeed, little, if any, reconstruction was necessary because Judge McInerney's finding that appellant was made to disrobe for purposes of a physical inspection was a clear adoption of Detective Grothe's testimony that appellant was naked for only five minutes. Moreover, Judge McInerney's finding as to the purpose of the disrobing is clearly not consistent with appellant's being naked for some two hours.

Appellant's argument that a new evidentiary hearing is required because the state did not adequately articulate its constitutional reasoning is also unpersuasive. "[T]he district judge may, in the ordinary case in which there has been no articulation, properly assume that the state trier of fact applied correct standards of federal law. Thus, if third-

degree methods of obtaining a confession are alleged and the state court refused to exclude the confession from evidence, the district judge may assume that the state trier found the facts against the petitioner . . . ." Id. at 315 (footnote omitted). We therefore believe that the district court's decision to defer to the factual findings of the state court was correct.

s/
HON. RALPH K. WINTER, U.S.C.J.

s/
HON. J. DANIEL MAHONEY, U.S.C.J.

s/
HON. EDWARD D. RE, JUDGE

N.B.: This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ROBERT B. WATERHOUSE, New York Parole Number AU600100, Florida State Prison Inmate Number 075376,

Petitioner-Appellant,

-against-

CV-86-4262

RAMON J. RODRIGUEZ, Chairman of the New York State Board of Parole, et al.,

MEMORANDUM AND ORDER

Respondents-Appellees.

GLASSER, United States District Judge:

This matter is before this court on remand from the United States Court of Appeals for the Second Circuit for determination of a coerced confession claim asserted in petitioner's application for habeas corpus relief challenging his 1967 conviction for second degree murder. See Waterhouse v. Rodriguez, 848 F.2d 375 (2d Cir. 1988). After the Second Circuit handed down its decision, petitioner moved

for an evidentiary hearing pursuant to Rule 8 of the Rules Governing Section 2254 Cases.

Petitioner's motion for an evidentiary hearing is denied. Further, after consideration of the merits of petitioner's coerced confession claim, petitioner's application for habeas corpus relief is denied.

Procedural History

On April 1, 1966, a Suffolk County Grand Jury indicted petitioner Robert Waterhouse on charges of first degree murder and second degree burglary in connection with the February 11, 1966 murder of Ella Mae Carter. At the request of petitioner's court appointed attorney, Edward LaFreniere, Suffolk County Judge George F.X. McInerney held a pretrial "Huntley hearing," see People v. Huntley,

15 N.Y.2d 72, 255 N.Y.S.2d 838, 204 N.E.2d 179 (1965), on November 14-15, 1966 to determine the admissibility of petitioner's written statement. (Respondents characterize the statement as a confession, although it does not recite that petitioner killed Mrs. Carter. Respondents' Memorandum of Law at 18 n.8.) After the hearing, Judge McInerney determined that petitioner had "knowingly, intelligently and voluntarily waived his rights," and ruled that the statement was admissible. Tr. I83.

Jury selection began, but it was soon discovered that Mr. LaFreniere, who represented petitioner throughout the hearing, had been disbarred on the second day of the Huntley hearing. See Suffolk County Bar Association v. LaFreniere, 26 A.D.2d 946, 274 N.Y.S.2d 656 (2d Dep't 1966), motion for leave to appeal dismissed, 19 N.Y.2d 809, 279 N.Y.S.2d 967,

226 N.E.2d 700, motion to vacate dismissal denied, 19 N.Y.2d 920, 281 N.Y.S.2d 105, 227 N.E.2d 899 (1967). The discovery of the disbarment led to a mistrial. The court appointed another attorney, Harry R. Brown, to represent petitioner, and ordered a new trial before Judge Thomas M. Stark. Mr. Brown requested another Huntley hearing, arguing that he should not be bound by any of Mr. LaFreniere's actions. Judge Stark denied the application, but agreed to reconsider the request after submission of supporting memoranda. Tr. 192-97.

The trial began on March 8, 1967. When Mr. Brown again applied to reopen the Huntley hearing, he was given leave to make his application before Judge McInerney. Tr. 229. The trial continued, with the prosecution presenting seven witnesses. On March 13, 1967, petitioner withdrew his

plea of not guilty and pleaded guilty to second degree murder in full satisfaction of the indictment. On April 28, 1967, Judge Stark sentenced petitioner to imprisonment for twenty years to life. On April 29, 1969, petitioner filed an application in Suffolk County Court for a writ of error coram nobis, alleging that Mr. Brown had failed to advise him of his right to appeal. The court granted his application, and, on October 29, 1969, sentenced petitioner to the same sentence, nunc pro tunc, thereby permitting an appeal of his conviction. That appeal was unsuccessful. People v. Waterhouse, 38 A.D.2d 1010, 331 N.Y.S.2d 372 (2d Dep't 1972), aff'd without opinion, 35 N.Y.2d 688, 361 N.Y.S.2d 160, 319 N.E. 422 (1974).

Petitioner's parole began in 1975. Some years later, a Florida jury convicted petitioner of first degree murder for the

January 2, 1980 death of Deborah Kammerer. Because of the existence of five aggravating factors, including the 1967 New York conviction, and the fact that petitioner murdered Kammerer while he was still on parole for the New York conviction, petitioner received a death sentence for the Florida murder. The Supreme Court of Florida initially affirmed, Waterhouse v. State, 429 So. 2d 301 (Fla.), cert. denied, 464 U.S. 977 (1983), but later vacated the death sentence pursuant to its grant of a habeas corpus petition. Waterhouse v. State, 522 So. 2d 341 (Fla.), cert. denied, Dugger v. Waterhouse, 109 S. Ct. 178, cert. denied, Waterhouse v. Florida, 109 S. Ct. 123 (1988).

On December 19, 1986, more than 19 years after the Suffolk County Court entered a judgment of his conviction, and 14 years after exhausting his state

appeals, petitioner filed a petition for a writ of habeas corpus with this court, seeking a vacatur of his New York conviction.[1] The petition originally

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1 Under Rule 9(a) of the Rules Governing Section 2254 Cases in the United States District Courts, "[a] petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred." The Advisory Committee Note to Rule 9 indicates that a presumption of prejudice to the state attaches where a petition is filed more than five years after the state court judgment. Despite the fact that petitioner's habeas corpus petition was filed well beyond this five year period, this court is persuaded, in view of Rule 9's origin in the equitable doctrine of laches, to adopt the Ninth Circuit's view that the inclusion of the five-year presumption in the Advisory Committee Note is an error. In LaLande v. Spalding, 651 F.2d 643 (9th Cir.), cert. denied, 452 U.S. 965 (1981), the court noted that Congress explicitly deleted the

(continued...)

1(...continued)
originally included five-year presumption language from Rule 9. The fact that the language remains in the Advisory Committee Note is of no consequence.

Respondents, therefore, bear the initial burden to make a "particularized" showing of prejudice caused by petitioner's delay. See, e.g., Ristau v. Kirk, 671 F. Supp. 955, 957 (E.D.N.Y. 1987). The respondents represent that they have been prejudiced by the delay by the petitioner in bringing this petition approximately nineteen years after entering his plea of guilty and approximately fourteen years after he exhausted his appellate remedies.

At the Huntley hearing held twenty-two years ago, testimony was adduced by the state of four members of the Suffolk County Police Department who were present and interacted with the petitioner on the occasions relevant to that hearing. The respondents know the whereabouts of only one of those witnesses. One is dead and the location of the other two is unknown. In addition, the respondents represent that they have been unable to locate the trial file and the physical evidence, the continued existence of all of which is highly speculative. Respondent's Supplemental Memorandum

(continued...)

advanced three constitutional claims: (1) that the conviction was obtained through the use of a coerced confession; (2) that petitioner's guilty plea was not made voluntarily and with an understanding of the nature of the charge and the consequences of the plea; and (3) that petitioner was denied his sixth amendment right to effective assistance of counsel.

1(...continued)
at 3.

The petitioner has made no showing that he could not have had knowledge of the grounds upon which his petition is based, nor that he could not have discovered those grounds by the exercise of reasonable diligence, nor that the state is actually not prejudiced.

I would have little difficulty in dismissing this petition pursuant to Rule 9(a) based upon a finding that its requirements have been satisfied. The egregiousness of the laches notwithstanding, however, the petitioner's claims will be addressed.

This court granted the writ on the third claim, holding that Mr. LaFreniere's disbarment during the Huntley hearing deprived petitioner of effective assistance of counsel. Waterhouse v. Rodriguez, 660 F. Supp. 319 (E.D.N.Y. 1987). The Court of Appeals reversed, remanding solely for this court's determination of the coerced confession question. Waterhouse v. Rodriguez, 848 F.2d 375 (2d Cir. 1988). The subsequent withdrawal of petitioner's involuntary plea claim, made in open court on November 4, 1988, eliminated any remaining exhaustion problem. See id. at 380 and 383. Petitioner exhausted his state remedies on the coerced confession claim through direct appeal.

Findings at the Huntley Hearing

At the Huntley hearing, the state presented the testimony of Detective Carl

Grothe, Sergeant Raymond Kowalski, Detective Carlos Garcia, and Lieutenant Conrad Teller, four members of the Suffolk County Police Department who were present and interacted with petitioner at various times during the morning of February 12, 1966 at the Greenport Village and the Riverhead Police Stations. Petitioner testified on his own behalf. After the two-day hearing, Judge McInerney made the following findings of fact:

> . . . [Petitioner] came to the Greenport Station House at about 2:00 o'clock in the morning on the 12th of February, 1966, in the company of a family friend, having heard that the police were looking for him. He was informed by detectives present at the Police Station when he arrived that he had the right to remain silent; that anything he said could be used against him; that he had the right to have a lawyer present then or at any time. [Petitioner] stated that he did not wish a lawyer at that time and wanted to cooperate, but would like one at court. [Petitioner] was observed to have

scratches on his face and stated he had received them the previous night in a fight at Greenport. The police then decided to transport [petitioner] to the Police Station at Riverhead and [petitioner] agreed. The Police told [petitioner] they would probably take a statement from him at the Riverhead Police Station and stated that a member of the Public Defenders' staff was in the locality. [Petitioner] appeared to sleep for about fifteen minutes enroute from Greenport to Riverhead. Upon arrival at approximately 3:35 A.M. at the Riverhead Police Station, [petitioner] was taken to the Interview Room by two detectives. [Petitioner] was again advised of his right to remain silent; that whatever he said could be used against him; and that he could have a lawyer present. [Petitioner] stated he did not want a lawyer at that time, but would like to have one at court. [Petitioner] was then interrogated with respect to events at the home of Mrs. Carter after he asked one of the two detectives to leave the room, which the detective did. The interrogation took about one and a half to two hours and consisted of an oral statement, which was reduced to writing, read aloud and signed by [petitioner] after he made several corrections and initialed them. No threats,

promises or coercion were used to induce the statement. [Petitioner] was undressed for physical inspection and the presence of a laceration on the inside of his left thigh was noticed. There was no warrant for the arrest of [petitioner] prior to the making of the statement and [petitioner] was not formally arrested until after the giving of the statement. [Petitioner] was in Police custody prior to his arrival at the Riverhead Police Station. [Petitioner] was not intoxicated at the Riverhead Police Station. The Police had questioned many people in the area with respect to the death of Mrs. Carter. [Petitioner] asked for and was given access to the telephone at the Riverhead Police Station when he desired, and used it at least twice. [Petitioner] was not handcuffed until after the statement in Riverhead. [Petitioner] stated at the hearing that he was in a financial position to hire a lawyer on the 12th of February, and that his aunt and uncle would have been able to hire one for him; his aunt and uncle being loco parentis.

Tr. 180-82.

Motion for an Evidentiary Hearing

Petitioner's assertion that his confession was involuntary raises a constitutional claim under the Fifth and Fourteenth Amendments. When a district court examines such a claim presented by a habeas corpus petitioner, it must hold a hearing when relevant facts are either in dispute or insufficiently developed, and the state court did not hold a full and fair evidentiary hearing. Townsend v. Sain, 372 U.S. 293, 312-13 (1963). Accordingly, petitioner has moved, pursuant to Rule 8 of the Rules Governing Section 2254 Cases,[2] for an evidentiary hearing to

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2 Rule 8 following § 2254 states:

> (a) Determination by court. If the petition is not dismissed at a previous stage in the proceeding, the judge, after the answer and the transcript and record of state court proceedings are
>
> (continued...)

determine what petitioner characterizes as disputed facts concerning events which took place the morning that petitioner signed the incriminating statement at issue at the Huntley hearing. Petitioner asserts that an evidentiary hearing is mandatory under both 28 U.S.C. § 2254(d) and the Supreme Court's decision in Townsend v. Sain, and that a hearing is necessary to resolve

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2(...continued)
filed, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require.

The Advisory Committee Notes to Rule 8 indicate that § 2254(d) "clearly places the burden on the petitioner" to show that the state court hearing was not "fair or adequate" because of one of the reasons listed in the statute.

discrepancies in the Huntley hearing testimony regarding the amount of time petitioner remained naked during his interrogation; whether the police gave petitioner his Miranda warnings[3] and an opportunity to contact his attorney or family; and whether police threatened petitioner with physical violence to force him to cooperate. See Petitioner's Memorandum of Law in Support of Motion for an Evidentiary Hearing at 3-5. Because the parties dispute the facts as to the events underlying petitioner's confession, the

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3 Although the interrogation took place prior to the June 13, 1966 decision of Miranda v. Arizona, 384 U.S. 436, that case is properly applied since both the Huntley hearing and the trial took place subsequent to its decision. See Johnson v. New Jersey, 384 U.S. 719 (1966) (Miranda applicable to cases where trial began after date of its decision).

court must decide whether the state court held a full and fair evidentiary hearing.

The court is satisfied that a full and fair evidentiary hearing took place at the state level, and therefore the voluntariness of petitioner's confession can be resolved by reference to the records of that hearing. Accordingly, petitioner's motion for an evidentiary hearing is denied.

In Townsend v. Sain, the Supreme Court set forth particular circumstances under which an evidentiary hearing must be afforded a habeas petitioner. Such a hearing is mandatory where:

> (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered

> evidence; (5) the material facts were not adequately developed at the state- court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

372 U.S. at 313. The provisions in 28 U.S.C. § 2254(d), amending the habeas corpus statute in 1966, codified the standards outlined in Townsend v. Sain.[4]

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4 By statute, a state court's determination after a hearing on the merits of a factual issue is presumed to be correct unless:

(1) the merits of the factual dispute were not resolved in the State court hearing;

(2) the fact finding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) the material facts were not adequately developed at the State court hearing;

(4) the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(continued...)

4(...continued)

(5) the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record . . .

(continued...)

Section 2254(d), adopting the rationale of its precursor, states that the federal district court may presume that the state court's factual determination is correct unless the habeas petitioner can establish one of the enumerated causes for exception. This presumption, however, only applies to the state court's findings of basic or historical facts, including the credibility of the witnesses narrating them. See Marshall v. Lonberger, 459 U.S. 422, 434 (1983) (section "2254 gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them"). "So-called mixed questions of fact and law, which require the application of a legal standard

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4(...continued)
28 U.S.C. § 2254(d).

to the historical-fact determinations, are not facts in this sense." Townsend v. Sain, 372 U.S. at 309 n.6.

In Miller v. Fenton, 106 S. Ct. 445 (1985), the Supreme Court examined the application of this presumption in the context of a habeas corpus petition alleging a coerced confession. The Court wrote that "'voluntariness' is a legal question requiring independent federal determination"[5] and should be treated by district courts as "beyond the reach of

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5 The requirement that the issue of voluntariness be given independent federal review is not a mandate to hold an evidentiary hearing. See, e.g., Crespo v. Armontrout, 818 F.2d 684, 686 (8th Cir.), cert. denied, 108 S. Ct. 492 (1987) ("federal court's obligation to independently review the voluntariness of a confession does not also include holding an evidentiary hearing"); Reddix v. Thigpen, 805 F.2d 506, 513 (5th Cir. 1986) ("Independent federal review . . . does not ineluctably mandate an evidentiary hearing.").

§ 2254(d)." 106 S. Ct. at 450 and 452-53. Independent consideration, however, need not extend to determinations underlying the voluntariness issues. The Court noted that

> subsidiary questions, such as the length and circumstances of the interrogation, the defendant's prior experience with the legal process, and familiarity with the Miranda warnings, often require the resolution of conflicting testimony of police and defendant. The law is therefore clear that state-court findings on such matters are conclusive on the habeas court if fairly supported in the record and if the other circumstances enumerated in § 2254(d) are inapplicable.

Id. at 453. Thus, if the Huntley hearing was procedurally fair, the court must accord substantial deference to Judge McInerney's determination of the facts surrounding the voluntariness of petitioner's confession. See Marshall v. Lonberger, 459 U.S. 422, 432 (1983).

Although § 2254(d)'s presumption of correctness of the state court's findings of fact "implicates similar concerns about the sufficiency of the state court's evidence" as those raised by the question of when a district court must hold an evidentiary hearing, Richmond v. Rickets, 774 F.2d 957, 961 (9th Cir. 1985), the presumption alone will not dispose of the question of whether to hold the hearing. To properly determine whether the state court made adequate findings of fact, a court must conduct an independent review of the record. Once the court performs its review, it can decide whether the presumption of correctness applies, or an evidentiary hearing is warranted. Id. at 962.

No matter whether the court examines the factors as articulated in Townsend v. Sain, or as enumerated in 28 U.S.C. § 2254(d), the result is the same --

petitioner fails to demonstrate that he is entitled to an evidentiary hearing. At oral argument on this motion, petitioner charged deprivation of a full and fair hearing under Townsend's second ground that "the state factual determination is not fairly supported by the record as a whole" (see corresponding provision § 2254(d)(8)); under Townsend's third ground that "the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing" (see corresponding provision § 2254(d)(2)); under Townsend's fifth ground that "the material facts were not adequately developed at the state-court hearing" (see corresponding provision § 2254(d)(3)); and under Townsend's sixth, catch-all ground, stating that an evidentiary hearing is mandatory where "for any reason it appears that the state trier of fact did not afford the habeas applicant a

full and fair fact hearing" (see corresponding provision § 2254(d)(6)). According to petitioner, these grounds are present because the attorneys did not develop through testimony, and Judge McInerney's findings of fact did not specify, the amount of time petitioner remained naked after he was told by police to remove his clothes for a physical inspection.

Petitioner urges, and the court agrees, that were petitioner forced to remain naked while subjected to hours of interrogation, a confession resulting from such a circumstance might rise to a constitutional violation. See, e.g., Malinski v. New York, 324 U.S 401, 405 (1945) (Court remarked that, had the confession at issue "been the product of persistent questioning while [defendant] stood stripped and naked, [the Court] would have a clear case."). The testimony of

Detective Carl Grothe, however, reflects that petitioner remained nude for approximately five minutes,[6] proving

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6 Detective Carl Grothe gave the following testimony when examined by the state's attorney:

Q. Now, Detective Grothe, after you arrived at the Seventh Squad Room, did you ask the defendant to strip?
A. Yes, we did, sir.
Q. Did you have a reason for that?
A. Yes, we did, sir.
MR. LA FRENIERE: Object to the form of that question, "Did you have a reason for it." Calls for a conclusion.
THE COURT: No, I'll allow it.
MR. LA FRENIERE: Take an exception.
Q. Would you tell us, please?
A. Yes, we did, sir. We stripped him to see if he had any injuries.
Q. Is that the usual police procedure?
MR. LA FRENIERE: I'll object to the form of that question.
THE COURT: Sustained.
Q. And how long was he in the room, whether it was the Squad Room or the Investigation Room, I'm not sure, how long was he there without any clothes on?
A. About five minutes.

(continued...)

baseless petitioner's argument that the attorneys failed to develop this fact. Further, although Judge McInerney did not make a determination as to the amount of time the defendant remained naked, it is clear that he fully accepted the testimony of the police officers that petitioner was told to remove his clothes for purposes of a physical inspection only. The omission of a specific time frame alone will not render the state court hearing inadequate or unfair.[7]

6(...continued)

Tr. 173.

7 It is interesting to note a portion of the trial record where petitioner's trial attorney, Harry Brown, essentially conceded the adequacy of Judge McInerney's findings:

> THE COURT: You are basically saying to me you disagree with Judge McInerney's decision, and that you may well take. But that would have to be

(continued...)

Petitioner's remaining contentions speak to his dissatisfaction with Judge McInerney's judgments on the credibility of the witnesses at the Huntley hearing, the testimony they gave, and the order in which it was given.[8] These arguments are meritless, as the record amply supports Judge McInerney's determination to accept

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7(...continued)
reviewed by an appellate court, not by me.

MR. BROWN: Your Honor, I think perhaps you are misunderstanding what I am saying. I am not saying that I find any fault whatsoever with Judge McInerney's decision, based upon what was presented to Judge McInerney.

8 ~~At oral~~ argument, petitioner's attorney contended that the court must grant an evidentiary hearing because the police officers gave what he characterized as "methodical" testimony, and because the testimony regarding the strip inspection was given when Detective Grothe was recalled to the stand, rather than during his initial testimony.

the facts as expressed by the state's witnesses. See discussion of merits of coerced confession claim, infra. Moreover, because this court makes its judgment after a review of the record, these subsidiary factual findings would be afforded § 2254(d)'s presumption of correctness. See Miller v. Fenton, 106 S. Ct. at 453; Marshall v. Lonberger, 459 U.S. at 434.

The Coerced Confession Claim

Petitioner asserts that the incriminating statement given to police at the Riverhead Station should have been suppressed at trial as a coerced confession. Judge McInerney's findings of fact are presumed correct, see 28 U.S.C. § 2254(d), but this presumption only extends to historical facts, i.e., external events and witness credibility, and not to mixed questions of law and fact.

See Marshall v. Lonberger, 459 U.S. 422, 434 (1983); Cuyler v. Sullivan, 446 U.S. 335, 341-42 (1980). As such, the court will defer to Judge McInerney's findings as to the facts underlying the voluntariness issue, but the central question of whether petitioner made his incriminating statement voluntarily requires this court's de novo review. Miller v. Fenton 106 S. Ct. 445 (1985).

The Fifth Amendment guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself," and the Fourteenth Amendment provides against the state's invasion of this privilege. See Malloy v. Hogan, 378 U.S. 1, 8 (1964). To justify denial of the petition this court must be satisfied that the incriminating statement at issue was given freely, and "in the unfettered exercise of [petitioner's] own will." Id.

As to the standard for determining the voluntariness of a confession, the Second Circuit recently noted that "there is only one guide -- the totality of the circumstances rule." Green v. Scully, 850 F.2d 894, 901 (2d Cir.), cert. denied, 109 S. Ct. 374 (1988).

In Green v. Scully, the Second Circuit further articulated the precise factors which come under consideration in this context. These factors are the particular characteristics of the accused, i.e., his experience, background, age, and intelligence; the conditions of interrogation, including the place of interrogation and the presence or absence of counsel; and, most important, the conduct of law enforcement officials. 850 F.2d at 901-02. As to police conduct, the court must examine the record for signs of coercion through either psychological or

physical deprivation or threats. See id. at 902. The totality of the circumstances rule should not be applied as a strict balancing test with one factor offsetting another. Instead, the court must examine all the surrounding circumstances of the confession and their collective impact upon petitioner. Id. Only after such an assessment can the court properly determine whether petitioner was acting of his own free will when he made the incriminating statement.

At the time of the interrogation, the early morning of February 12, 1966, petitioner was a 19 year old literate high school graduate, apparently trained in the field of data processing. Petitioner lived with the foster parents who had cared for him as their only child since he was an infant of six months. Tr. 21, 108-09. Both foster parents were employed, the

father as a shipyard foreman and the mother as a waitress. Tr. 131. There is no indication that petitioner, at that time, had any particular familiarity with the criminal justice system, having never been convicted of a crime. Tr. 109. Petitioner apparently did have a general familiarity with the role of a lawyer, as the record indicates that he had previously been represented by counsel concerning certain traffic violations. Tr. 109, 111. Nothing about petitioner's personal characteristics would lead the court to conclude that he was particularly vulnerable or inclined to lose control of his rational intellect or free will.

An examination of the conditions under which petitioner was questioned and the conduct of the law enforcement officers present at the interrogation raises the three factual disputes between the parties:

(1) whether the police properly advised petitioner of his rights and permitted him to choose whether or not to contact counsel, (2) whether petitioner was visibly intoxicated at the time of the interrogation, and (3) whether the police forced petitioner to endure questioning while sitting naked on a metal chair for an extended period of time.

Based upon the testimony at the Huntley hearing, Judge McInerney specifically found that the detectives twice advised petitioner of his rights (at the Greenport Station and at the Riverhead Station) and that petitioner twice waived the right to have an attorney present during questioning but indicated that he wanted an attorney to represent him in court. Tr. 180-81. Having found that Judge McInerney provided a full and fair hearing on the coerced confession issue,

the court accepts these findings as true historical facts underlying the voluntariness issue. See Miller v. Fenton, 106 S. Ct at 453.

Judge McInerney did not make particular factual findings, however, as to the amount of time petitioner remained naked or as to whether petitioner was intoxicated during the interrogation. These issues, therefore, require a full examination of the record prior to resolution of their impact upon the voluntariness of petitioner's statement.

Petitioner, upon learning that the police were looking for him, voluntarily went to the police station in Greenport, New York, arriving at about 2:00 a.m. Although a friend accompanied petitioner, the friend was not permitted to remain with him while he was questioned by police. The police did not place petitioner under

arrest, but questioned him in the police station. Tr. 14, 18. The police then decided to transport petitioner in a police car to the "Seventh Squad," the police station in Riverhead, New York, some 35 minutes away from Greenport. The petitioner was not handcuffed during the trip. He sat in the back of the car with his eyes closed, but testified that he did not fall asleep. Tr. 115-16. At Riverhead Station, the police escorted petitioner to an interrogation room where he was questioned by Detective Carl Grothe. The police continued to confine petitioner to the interrogation room for approximately two hours. Tr. 28. Sergeant Raymond Kowalski was initially present in the interrogation room, but left the room upon petitioner's request. Tr. 27-28. During this two hour period the petitioner made incriminating statements to Detective

Grothe, which statements were ultimately reduced to a writing and signed by petitioner. These facts on their face, i.e., the fact that petitioner entered the police station voluntarily, the lack of handcuffs or arrest, and the Sergeant's accession to petitioner's wish that he leave the room, would fall far short of representing a coercive environment and, in fact, would tend to indicate an environment entirely absent of coercion.

Despite petitioner's contention, the record does not indicate that petitioner was intoxicated during the interrogation or at the time he signed the incriminating statement. Petitioner argues that the police should have realized his obvious state of intoxication because petitioner fell asleep in the car on the way to the Riverhead Police Station. See Petitioner's Reply Memorandum at 9. Petitioner testi-

fied to the contrary at the Huntley hearing, stating that he was not asleep in the car but merely had shut his eyes, and, supposedly, heard the officers in the car planning to coerce him to confess. Tr. 116. The officers do not dispute that the petitioner appeared to be asleep for about fifteen minutes during the ride from Greenport to Riverhead, and Judge McInerney found this to be so after the Huntley hearing. Tr. 180.

Petitioner testified at the hearing that he had been drinking prior to coming to the Greenport Police Station. Tr. 133. He further testified that, although he did not recall the police beating him, he felt sure that even if they had physically abused him he wouldn't have realized it because he was so drunk at the time. Tr. 133, 143. Despite his allegedly drunken state, petitioner told the court

that he definitely recalled that the detectives had repeatedly threatened to beat him up. Tr. 121. He testified that he specifically heard Sergeant Kowalski make the following statement to the other detective in the car on the way to Riverhead: "Well, he didn't tell us anything there, but we'll get it out of him up here." Tr. 116. He also quoted Sergeant Kowalski as later saying that "he had six eager sergeants outside waiting to become lieutenants or something like that," and that they were going to become lieutenants "by beating [him] up." Tr. 121. The variety and contradictory nature of petitioner's assertions during his testimony leave the court with only one concrete factual finding as to petitioner's state of mind during the interrogation period. That fact would be, as found by Judge McInerney, that petitioner "appeared"

to be asleep in the police car enroute to Riverhead. The sole fact that petitioner appeared to the police officers to be asleep falls far short of indicating intoxication.

Additionally, it has not escaped the attention of the court that, even if petitioner had been intoxicated upon arrival at the Greenport Station, by petitioner's own count approximately four hours of interrogation took place prior to the time that petitioner made the incriminating statement. The court does not imply that a state of severe intoxication could not possibly continue for over a four hour period. However, the passage of time, combined with petitioner's apparent ability to recall specific conversations between the police officers, as well as questions and remarks directed toward him by the officers, all of which allegedly took place

while he was heavily intoxicated, make the possibility that petitioner lacked rational intellect and free will due to drunkenness profoundly unlikely.

Finally, petitioner argues that the police forced him to strip and remain naked and sit on a metal chair for a prolonged period of time while he endured interrogation. Although this would no doubt create a highly coercive environment, again, the record does not support petitioner's contention that he was subjected to such treatment by the police. Detective Grothe testified that petitioner remained naked for only five minutes, pursuant to an inspection for injuries on petitioner's body. Tr. 173. Petitioner claims that the police refused to permit him to get dressed for over two hours, and suggests that his lack of "cooperation" provided the motivation for the strip

inspection. Tr. 119 and Petitioner's Reply Memorandum at 9 n.2. It seems clear from the record, however, that the police stripped petitioner for inspection purposes, since scratches, cuts, and a gash were evident on petitioner's body and his pants were ripped. Tr. 161. Judge McInerney determined as much in his findings of fact; however, he failed to specify the amount of time petitioner remained naked. There is no indication that Judge McInerney found the strip inspection to be improper. None of the officers, during either direct or cross-examination, were asked about, or offered testimony as to, the amount of time petitioner remained naked at Riverhead. Indeed, the time factor did not appear to be an issue until petitioner's testimony alleged that he was naked for a two hour period; Detective Grothe's rebuttal

testimony then indicated that petitioner was naked for a five minute period. Oddly, petitioner's reply papers do not rely upon petitioner's estimate that he was naked for over two hours, and instead state that petitioner was naked "part of [the] time" he was questioned. Petitioner's Reply Memorandum at 8.

The record before this court does not allow for a definitive finding as to the precise amount of time that petitioner remained naked at the Riverhead Station. However, based upon the record and Judge McInerney's findings, the purpose of the strip was to evaluate injuries sustained by petitioner and to search for further injuries. Forcing petitioner to remain naked for such a length of time as petitioner asserts would be inconsistent with a strip search done for inspection purposes. It is this court's view that

petitioner was not forced to sit naked on a metal chair while interrogated for two hours, but was forced to strip for inspection purposes only and for a time period commensurate with the carrying out of such a search.

Conclusion

A review of the totality of the circumstances presented by the record in this case, including those historical facts surrounding the issue of voluntariness found by Judge McInerney, leads this court to conclude that petitioner made the incriminating statement at the Riverhead Police Station not as a result of police coercion, but as an act of his own free will and rational intellect. The use of the incriminating statement at trial did not, therefore, violate petitioner's constitutional rights. Accordingly,

petitioner's application for a writ of habeas corpus is denied. Should petitioner wish to appeal the court's determination, this order shall constitute a certificate of probable cause within the meaning of Federal Rule of Appellate Procedure 22(b).

SO ORDERED.

s/
United States District Judge

Dated: Brooklyn, New York
Feb. 16, 1989

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ROBERT B. WATERHOUSE, New York Parole Number AU600100, Florida State Prison Inmate Number 075376,

Petitioner-Appellee,

-against- No. 87-2221

RAMON J. RODRIGUEZ, Chairman of the New York State Board of Parole, et al.,

Respondents-Appellants.

Petition was brought for writ of habeas corpus. The United States District Court for the Eastern District of New York, 660 F. Supp 319, Israel Leo Glasser, J., granted writ and appeal was taken. The Court of Appeals, Winter, Circuit Judge, held that: (1) habeas corpus petitioner exhausted his state court remedies on his ineffective assistance of counsel claim so as to allow habeas review, and (2) disbarment of habeas corpus petitioner's counsel

during pretrial suppression hearing resulted in no denial of petitioner's Sixth Amendment right to effective assistance of counsel.

Reversed and remanded.

Demetri M. Jones, Asst. Dist. Atty. of Suffolk County, Riverhead, N.Y. (Patrick Henry, Dist. Atty. of Suffolk County, Riverhead, N.Y., of counsel), for respondents-appellants.

James D. Herschlein, New York City (Ira S. Sacks, Kaye, Scholer, Fierman, Hays & Handler, New York City, of counsel), for petitioner-appellee.

Before VAN GRAAFEILAND, WINTER and MAHONEY, Circuit Judges.

WINTER, Circuit Judge:

In Solina v. United States, 709 F.2d 160 (2d Cir. 1983), we held that a criminal defendant is denied his sixth amendment right to effective assistance of counsel when, unbeknownst to the defendant, he is represented by unlicensed counsel. This appeal raises the question whether Solina applies when a defendant's counsel is

disbarred during a pretrial proceeding but withdraws after becoming aware of the disbarment.

Petitioner Robert B. Waterhouse is under a sentence of death in Florida for first-degree murder of Deborah Kammer in 1980. Waterhouse v. State, 429 So. 2d 301 (Fla.), cert. denied, 464 U.S. 977, 104 S. Ct. 415, 78 L. Ed. 2d 352 (1983). Two of the five aggravating factors that justified imposition of the death sentence concern a prior encounter Waterhouse had with the New York legal system. The first was Waterhouse's previous conviction in a New York court for second-degree murder, a crime of violence. The second was that Waterhouse was still on parole for the New York murder, and therefore under a sentence of imprisonment, when he murdered Deborah Kammer. He had been paroled in 1975. On December 19, 1986, Waterhouse filed a

petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (1982) in the Eastern District seeking vacatur of the New York conviction as part of a collateral attack upon the Florida death sentence. His petition set out three claims. The first and second alleged that a confession used against him was coerced and that his guilty plea was involuntary. Judge Glasser granted the writ on Waterhouse's third claim, which asserted that the disbarment of Waterhouse's counsel during a pretrial suppression hearing resulted in the denial of Waterhouse's sixth amendment right to effective assistance of counsel under Solina. Waterhouse v. Rodriguez, 660 F. Supp. 319 (E.D.N.Y. 1987).

On appeal, respondents argue that Waterhouse's failure to raise his sixth amendment claim either at trial or in his appeal to the Appellate Division precludes

a finding that he has exhausted this claim in the state courts. In the alternative, they contend that, even if the claim is deemed exhausted, Solina does not apply in the circumstances of this case and that the petition should be dismissed on the merits. We hold that Waterhouse exhausted his sixth amendment claim but that Solina does not apply on the facts of this case. Accordingly, we reverse and remand.

BACKGROUND

At about 8:15 p.m. on February 11, 1966, the nude body of Mrs. Ella Mae Carter, a 76-year old resident of Greenport, New York, was found lying across her bed. She had multiple injuries on her head and body and had been strangled. When Waterhouse arrived home sometime after 1:00 a.m. on February 12, he found a message that the police wanted to speak to him. Accompanied by a family friend,

Kenneth Norwood, he voluntarily arrived at the Greenport police station at approximately 2:00 a.m. Sometime later, Norwood was told to leave. After questioning Waterhouse about Mrs. Carter's death for approximately one hour, the police became concerned about the number of people passing through the station who could look through a window into the room in which they were interrogating Waterhouse. They decided, therefore, to take him to the Seventh Squad detective office in Riverhead, a half hour ride from Greenport. The questioning continued during the ride, except for a fifteen minute period during which Waterhouse appeared to have fallen asleep.

Sometime after arriving in Riverhead, Waterhouse confessed to the killing. A confession was then typed out, which Waterhouse signed after initialing some

corrections. The second paragraph of the confession stated "I have been advised that I do not have to give a statement, but I would like to cooperate and give this statement. I do not want a lawyer now but would like to have one when I go to court." Waterhouse signed the confession at approximately 6:00 a.m. on the morning of February 12, 1966. He was then arrested and charged with first-degree murder.

Waterhouse's first lawyer, Edward LaFreniere, obtained a pretrial "Huntley hearing," see People v. Huntley, 15 N.Y.2d 62, 255 N.Y.S.2d 838, 204 N.E.2d 179 (1965), before Judge McInerney of Suffolk County Court, to determine whether Waterhouse's confession had been coerced. At the hearing, four police officers testified for the state, while Waterhouse was the only witness called by the defense. During cross-examination of a police

witness, LaFreniere referred to Norwood, who was in the courtroom, but did not call him as a witness. LaFreniere engaged in extensive cross-examination of the police witnesses, made numerous objections, took timely exceptions to adverse rulings, and brought out on direct examination of Waterhouse a version of events contradicting that offered by the prosecution.

According to the police, Waterhouse was informed of his right to counsel and his right to remain silent when he first arrived at the Greenport station and at several other times during his interrogation. The police denied making any threats or promises and stated that Waterhouse had told them he wanted to cooperate. They testified that Waterhouse repeatedly declined representation, declaring that he wanted a lawyer only when he went to court.

Waterhouse painted a different picture. He testified that he was intoxicated when he arrived at the police station. He claimed that the police had failed to advise him of his right to counsel and that he had repeatedly asked for, and was denied, an opportunity to call an attorney or family member. He denied he had fallen asleep during any portion of the trip to Riverhead. He claimed instead that he had merely closed his eyes for a while and that during this time he had heard the police planning to coerce a confession from him. He said he was physically threatened by the police and confessed only after having forced to sit naked for two-and-one-half hours in a metal chair. He admitted signing the confession but did not recall initialing any corrections. Only after he had signed the

confession was he allowed to dress and make a phone call.

In rebuttal, police witnesses denied the pertinent portions of Waterhouse's testimony. They reiterated that they had several times advised him of his rights and had even offered to contact the public defender for him. They stated that there was no indication that Waterhouse was drunk but that he did appear to fall asleep about halfway to Riverhead. They conceded that he was told to remove his clothes so the officers might determine whether he had bruises in addition to observable facial scratches. After five minutes, he was allowed to dress.

After the Huntley hearing concluded on the morning of November 15, 1966, Judge McInerney found beyond a reasonable doubt that the facts were as the police had described and that the confession was

admissible because "as a matter of law . . . the defendant knowingly, intelligently and voluntarily waived his rights." Jury selection was scheduled to commence shortly thereafter. Instead, the court declared a mistrial when it learned that LaFreniere, who had been a member of the New York bar since 1934, had been disbarred for misappropriating client funds and for failing to represent clients after accepting fees. See Suffolk County Bar Ass'n v. LaFreniere, 26 A.D.2d 946, 274 N.Y.S.2d 656 (2d Dep't 1966), appeal dismissed, 19 N.Y.2d 809, 279 N.Y.S.2d 967, 226 N.E.2d 700, motion denied, 19 N.Y.2d 920, 201 N.Y.S.2d 105, 227 N.E.2d 899 (1967). The order of disbarment became effective when entered on November 15, 1966, the second and final day of the Huntley hearing. LaFreniere withdrew as

Waterhouse's counsel upon learning of his disbarment.

Harry R. Brown was thereafter appointed as counsel for Waterhouse. On March 6, 1967, jury selection began, this time before Judge Stark. Brown made several oral applications, including a motion for a new Huntley hearing. He claimed that he should not be bound by the actions of his client's previous attorney. Brown, who had read a transcript of the Huntley hearing, noted LaFreniere's failure to call witnesses other than Waterhouse and referred specifically to Norwood, who was again present in the courtroom. He also stated his belief that the challenge to Waterhouse's confession would have succeeded had other witnesses been called. Judge Stark was not persuaded but gave Brown permission to file a memorandum addressing his right to reopen the hearing.

On March 8, 1967, after jury selection had been completed, Brown renewed his motion for another Huntley hearing. Judge Stark denied the motion on the ground that Judge McInerney's ruling was binding. The case then went to trial, during which Waterhouse pled guilty on Brown's advice to a reduced charge of second-degree murder. On April 28, 1967, Waterhouse received an indeterminate sentence of twenty years to life.

On April 29, 1969, Waterhouse filed an application in Suffolk County Court for a writ of error coram nobis. He alleged that Brown had misled him as to his right to appeal and accordingly sought resentencing nunc pro tunc, so that he might perfect an appeal. His supporting affidavit recited the procedural history of his case, including LaFreniere's disbarment and Brown's attempt to obtain another Huntley

hearing. The only error Waterhouse sought to correct through the writ, however, was Brown's failure to advise him of his right to appeal. The application was granted on September 3, 1969, thereby affording Waterhouse an opportunity to appeal.

Waterhouse thereupon appealed to the Appellate Division. The brief submitted by assigned counsel raised two points. The heading for "Point I" stated "Motion for new Huntley hearing should have been decided before trial commenced." The three-paragraph argument in support of this proposition was based entirely upon Section 813-h of the New York Criminal Procedure Law (repealed 1970, current version at N.Y. Crim. Pro. Law § 710.40(30) (McKinney 1984)), which required pretrial suppression motions to be decided prior to trial. In the fourth and

final paragraph of Point I, Waterhouse argued:

> The entire concept behind the preliminary hearing process was breached when this crucial question [of whether there should be a new Huntley hearing] was left open by the trial judge. Certainly Mr. Brown should have been granted the right to a new hearing. The hearing conducted by Mr. LaFreniere was fine as far as it went, but many questions were unanswered that could have been supplied by a witness who was present in court. That witness was Kenneth Norwood. He could have testified as to the degree of the defendant's intoxication when he voluntarily appeared at the police station in Greenport. He might have been able to testify concerning the requests made by the defendant to make a telephone call or seek legal counsel. Mr. Brown wished to produce this witness who was then in the courtroom again.

In Point II, "Finding of voluntariness of statement and waiver of rights not supported by the record," Waterhouse argued that the warnings given to him were insufficient by the standards

of Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and that his confession was involuntary.

The Appellate Division affirmed Waterhouse's conviction without opinion. People v. Waterhouse, 38 A.D.2d 1010, 331 N.Y.S.2d 372 (2d Dep't 1972). Acting pro se, Waterhouse then sought leave to appeal to the New York State Court of Appeals. In support of his motion, he contended that he had been given only a partial Huntley hearing because he was not afforded the opportunity to call witnesses who were present at the hearing. Waterhouse argued that the refusal to reopen the Huntley hearing so hampered Brown's representation that he was denied effective assistance of counsel and forced to accept a last-chance plea.

Waterhouse also sent a letter to Judge Marcus G. Christ of the Appellate

Division. In this letter, he repeated his argument concerning the lack of opportunity to call witnesses upon his behalf. He also stated that he had urged his appellate counsel "repeatedly to raise this issue on appeal with no apparent success." Finally, he raised for the first time a claim that LaFreniere's (rather than Brown's) representation had been ineffective. He stated that "the total circumstances of the initial hearing and counsels [sic] disbarment, raised serious questions of said counsels [sic] competency and the affect upon appellant's right to a full plenary hearing." The state responded that the "alleged inadequacy of various attorneys assigned to him during the various proceedings" involved events that were not part of the record on appeal. Judge Christ granted leave to appeal to the Court of Appeals on May 22, 1972.

Waterhouse was assigned new counsel for the appeal.

Waterhouse's brief in the Court of Appeals raised two new points, one of which, "Point III," is relevant to the present appeal. In that point, Waterhouse argued that "[w]here the physical condition of the defense attorney brings into question the fairness of the proceedings, a new evidentiary hearing is in order." Waterhouse asserted that the pressure of facing disbarment substantially affected LaFreniere's representation of Waterhouse at the Huntley hearing.

In response, the state argued that Waterhouse's failure to raise LaFreniere's impairment at trial or on appeal to the Appellate Division constituted a waiver. In the alternative, the state argued there was no evidence that LaFreniere was incapacitated. On October 7, 1974, the

Court of Appeals affirmed, without opinion, the judgment of the Appellate Division. People v. Waterhouse, 35 N.Y.2d 688, 361 N.Y.S.2d 160, 319 N.E.2d 422 (1974).

DISCUSSION

1. The Rose v. Lundy Problem

Judge Glasser granted the writ on the grounds that Waterhouse had exhausted his sixth amendment claim in the state courts and that that claim was meritorious under our decision in Solina. He did not reach Waterhouse's other claims. He understandably perceived no need to reach the coerced-confession claim, conceded by respondents to have been exhausted, because Waterhouse would be entitled to a new Huntley hearing at his new trial. Judge Glasser also held that there was no need to reach the involuntary-plea issue in view of Waterhouse's entitlement to a new trial. Whether the involuntary-plea claim has been

exhausted is a matter in dispute, however, and under Rose v. Lundy, 455 U.S. 509, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982), the district court should not have reached the merits of any of Waterhouse's claims until it first determined that each of them had been exhausted. Indeed, as matters now stand on this appeal, there is a question as to whether we can address the merits of the granting of the writ in light of the status of the involuntary-plea claim.

We believe it clear that the involuntary-plea claim was never raised in the state courts. The only claim involving his guilty plea was Waterhouse's assertion that he had not been advised of his right to appeal (which he was then accorded). He never argued that his plea was involuntary. Because the claim was never raised, it cannot have been exhausted. Nevertheless, we believe that we should reach the merits

of this appeal. Waterhouse offered in the district court to withdraw the involuntary-plea claim if the court found it not to have been exhausted so that his other claims could be heard. See id. at 520-21, 102 S. Ct. at 1204-05. If we were to reverse on Rose v. Lundy grounds and remand, the involuntary-plea claim will be dropped. The district court will then enter the identical judgment now before us, and an identical appeal will be taken. Nothing is to be gained by adopting this procedure.[1] We therefore address the merits.

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1 Our recent decision in Grady v. Lefevre, 846 F.2d 862 (2d Cir. 1988), is thus distinguishable. In that case, the exhausted and unexhausted claims were "intertwined," id. at 865, and the state courts never had an "opportunity to consider all the circumstances and the cumulative effect to all the claims as a whole." Id.

2. Exhaustion of the Sixth Amendment Claim

The exhaustion requirement is designed to assure that the petitioner has first given the state courts "a fair opportunity" to pass upon his claims. Daye v. Attorney General, 696 F.2d 186, 191 (2d Cir. 1982) (in banc), cert. denied, 464 U.S. 1048, 104 S. Ct. 723, 79 L. Ed. 2d 184 (1984) (citing Picard v. Connor, 404 U.S. 270, 275, 92 S. Ct. 509, 512, 30 L. Ed. 2d 438 (1971); Wilwording v. Swenson, 404 U.S. 249, 92 S.Ct. 407, 30 L. Ed. 2d 418 (1971) (per curiam)). In order to give the state courts such a "fair opportunity," the legal doctrines asserted in the state and federal courts must be "substantially the same." Id. at 192. The legal theory relied upon in the federal court need not, however, be identical to the legal theory presented to the state courts, provided that the essential

factual allegations and the ultimate constitutional question raised in the federal petition were presented to the state courts. Id. at 192, n.4.

In Daye, we summarized "the ways in which a state defendant may fairly present to the state courts the constitutional nature of his claim, even without citing chapter and verse of the Constitution," id. at 194, as including:

> (a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state cases employing constitutional analysis in like fact situations, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation.

Id.

Although we cannot agree with the district court that Waterhouse raised his ineffective assistance of counsel argument

before the Appellate Division, we believe that issue was raised in the Court of Appeals. His argument in the Appellate Division was essentially a claim that a second Huntley hearing was necessary because of the requirements of New York procedural law. His subsequent letter to Judge Christ in support of his motion for leave to appeal claimed for the first time that he had received ineffective assistance from LaFreniere. After that motion was granted, his brief to the Court of Appeals noted that LaFreniere was disbarred as of the last day of the Huntley hearing and claimed that the prospect of disbarment "substantially affected" LaFreniere's representation. Although the claim may have been spare in detail, we believe that it sufficed "to call to mind a specific right protected by the Constitution" or amounted to an "allegation of a pattern of

facts that is well within the mainstream of constitutional litigation." Id. The state's response to the motion for leave to appeal acknowledged that Waterhouse's papers complained of the "inadequacy" of his various counsel, and its brief in the Court of Appeals recognized the nature of his newly-raised claim by denying there was any evidence of LaFreniere's incapacitation at the Huntley hearing. Although Waterhouse now frames his claim as a per se violation of his sixth amendment right in light of Solina, we believe that his claim was raised in a sufficiently precise manner in the Court of Appeals to satisfy the requirements of Daye.

Even though Waterhouse has satisfied the "fair opportunity" standard of Daye so far as the New York Court of Appeals is concerned, his failure to raise it in the lower New York courts may nevertheless bar

him from obtaining federal review of his claim. See Wainwright v. Sykes, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977). According to Sykes, a procedural default in state court provides dispositive and independent state grounds for upholding the conviction, thereby rendering federal habeas review superfluous. Id. at 86-87, 97 S. Ct. at 2506-07.

We must thus address the question whether Waterhouse's failure to raise the sixth amendment claim earlier was a procedural default and was the basis for the Court of Appeals' affirmance of his conviction. In its brief to the Court of Appeals, the state argued that Waterhouse's "Point III" had not been previously raised and was therefore barred under New York law. The Court of Appeals affirmed without opinion. When the state has urged

affirmance of a conviction on procedural grounds as well as on the merits and the state appellate court affirms without opinion, a federal court will generally infer that the state appellate court based its decision upon the petitioner's procedural default. See Rosenfeld v. Dunham, 820 F.2d 52, 54 (2d Cir.), cert. denied ___ U.S. ___, 108 S. Ct. 463, 98 L. Ed. 2d 402 (1987); Martinez v. Harris, 675 F.2d 51, 54 (2d Cir.), cert. denied, 459 U.S. 849, 103 S. Ct. 392, 74 L. Ed. 2d 521 (1982). In such circumstances, adequate and independent state grounds exist to bar federal habeas review. However, where a constitutional claim is clearly not subject to procedural forfeiture under state law, an inference that the state appellate court's silence indicates a decision resting on a procedural default rather than a negative

view of the merits cannot be justified. Federal habeas review of the merits in such circumstances is not barred. Hawkins v. LeFevre, 758 F.2d 866, 874 (2d Cir. 1985)

Under New York law, the Court of Appeals will entertain a claim of ineffective assistance of counsel despite the defendant's failure to raise that claim at trial or before the Appellate Division. See People v. Angelakos, 70 N.Y.2d 670, 673, 518 N.Y.S.2d 784, 786, 512 N.E.2d 305, 307 (1987); People v. Jones, 55 N.Y.2d 771, 773, 447 N.Y.S.2d 242, 243, 431 N.E.2d 967, 968 (1981). Given that rule[2], we cannot

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2 The decisions cited occurred well after Waterhouse's appeal. Nevertheless, they equate the right to effective assistance with the right to counsel. See Jones, 55 N.Y.2d at 773, 447 N.Y.S.2d at 243, 431 N.E.2d at 968 (citing People v. Baldi, 54 N.Y.2d 137, 444 N.Y.S.2d 893, 429 N.E.2d 400 (1981)). The right to counsel, of course, pre-exists Waterhouse's appeal.

infer that in silently affirming Waterhouse's conviction, the Court of Appeals' decision was based on a procedural default rather than on the merits. Accordingly, we hold that Waterhouse's ineffective assistance of counsel claim was exhausted and now turn to the merits.

3. Waterhouse's Sixth Amendment Claim

In holding that Waterhouse was deprived of his sixth amendment right to effective assistance of counsel, the district court relied solely upon Solina v. United States, 709 F.2d 160 (2d Cir. 1983). Solina had been represented at his trial for bank robbery by one Coleman, a law school graduate who had never been admitted to the practice of law in any state. Eleven years after his conviction, Solina learned of Coleman's unlicensed status. He then brought an action under 28

U.S.C. § 2255 seeking vacatur of his conviction and a new trial. The district court agreed that Solina had been denied his sixth amendment right to effective assistance of counsel but denied the motion based upon its conclusion that the sixth amendment violation was harmless beyond a reasonable doubt. See id. at 161-62. We agreed with the district court's conclusion that, given the evidence against Solina, even a lawyer admitted in every state could not have gained an acquittal. Id. at 164.

Nevertheless, we refused to employ harmless-error analysis, but instead imposed a per se rule under which a violation of the sixth amendment will be found

> where, unbeknown to the defendant, his representative was not authorized to practice law in any state, and the lack of such authorization stemmed from failure to seek it or from its denial for a reason going to

> legal ability, such as failure to pass a bar examination, or want of moral character.

Id. at 167 (citation omitted). In Solina we felt obliged to impose a per se rule because of Supreme Court precedent adopting the "somewhat surprising thesis" that there is "jurisdictional defect" where a defendant is not represented by counsel at a criminal proceeding. Id. at 168-69 (citing Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L.Ed. 1461 (1938)). However, an alternative rationale for our decision was that persons who would knowingly commit the crime of unlicensed practice of law would inevitably suffer from serious constraints on their ability to provide effective representation to a criminal defendant. "Such a person cannot be wholly free from fear of what might happen if a vigorous defense should lead the prosecutor or the trial judge to

inquire into his background and discover his lack of credentials." Id. at 164. We also noted that someone insensitive to the duty not to undertake representation in a criminal proceeding without a license is hardly likely to be more sensitive to his or her duty of undivided loyalty to the client. Id. at 164-65.

The alternative rationale of Solina was embraced in United States v. Cancilla, 725 F.2d 867 (2d Cir. 1984), where a defendant was represented by licensed counsel who was himself guilty of the same criminal conduct for which the defendant was being tried. The rationale for applying the per se rule was that, as in Solina, a vigorous defense risked exposure of the defense counsel's participation in the crimes. Id. at 870. Nevertheless, we have adopted and applied the per se rule "without enthusiasm," however, see Solina,

709 F.2d at 169; Cancilla, 725 F.2d at 870, and we have never purported to expand applicability of the rule beyond the sort of egregious conduct present in Solina and Cancilla.

The district court concluded that LaFreniere's representation of Waterhouse at the Huntley hearing fell squarely within Solina on the ground that Waterhouse lacked licensed counsel because "LaFreniere was not an attorney" during the second day of the Huntley hearing. 660 F. Supp. at 324. The district court also noted that LaFreniere was disbarred for "want of moral character" within the meanings of that phrase in Solina. Id. Indeed, the district court considered the charges that led to LaFreniere's disbarment -- that he accepted fees from clients but failed to make any efforts on their behalf and that he misappropriated client funds -- "very

similar" to Waterhouse's charge that LaFreniere failed to call available witnesses at the Huntley hearing. Id.

We disagree, however, with both the district court's interpretation of the record and its conclusion that the per se rule of Solina applies to this case. LaFreniere was a member of the bar when the Huntley hearing began. He ceased representation of Waterhouse immediately after learning of the disbarment. There was thus no conflict of interest, much less the sort of egregious conduct that the rule in Solina is designed to prevent. It is by no means clear that a state can sanction a lawyer for representing a client when a disbarment order has been entered that day but is as yet unknown to the lawyer. Such a rule would encounter a severe, if not insurmountable, constitutional objection and is unnecessary in light of the state's

power to suspend attorneys pending final disposition of grievances against them. Unlike the phony attorney in Solina, or the attorney who himself was guilty of the same crimes for which his client was being tried in Cancilla, LaFreniere had no reason to fear that vigorous advocacy on behalf of his client would expose him to criminal liability or any other sanction. If anything, the charges pending against LaFreniere provided an incentive for the vigorous efforts he appears to have expended. Moreover, the charges underlying his disbarment were unrelated to his representation of Waterhouse, and we do not agree with the district court that these charges were "very similar" to his failure to call Norwood at the Huntley hearing. LaFreniere did call Waterhouse himself and otherwise participated vigorously in the hearing. Given Norwood's limited contact

with pertinent events, the failure to call him is hardly the equivalent of the acceptance of legal fees with no subsequent representation. We therefore cannot accept the district court's conclusion that on the second day of the hearing, Waterhouse "lacked counsel" in any way implicating the concerns behind the per se rule of Solina.

CONCLUSION

The order of the district court conditionally granting the writ on the grounds ~~that~~ Waterhouse's sixth amendment rights were violated is reversed. We remand to the district court for consideration of his coerced-confession claim, which can proceed after Waterhouse withdraws the involuntary-plea claim.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ROBERT B. WATERHOUSE, New York Parole Number AU600100, Florida State Prison Inmate Number 075376,

Petitioner-Appellant,

-against- No. CV 86 4262

RAMON J. RODRIGUEZ, Chairman of the New York State Board of Parole, et al.,

Respondents-Appellees.

May 14, 1987.

Petitioner filed petition for writ of habeas corpus seeking vacatur of New York conviction for second-degree murder. The District Court, Glasser, J., held that: (1) petitioner had exhausted state remedies on his ineffective assistance of counsel claim, and (2) petitioner was denied effective assistance of counsel due to his former attorney's being disbarred during

pretrial hearing to determine whether confession had been coerced.

So ordered.

Ira S. Sacks, James D. Herschlein, Kaye, Scholer, Fierman, Hays & Handler, New York City, for petitioner.

Demetri M. Jones, Asst. Dist. Atty. (Patrick Henry, Dist. Atty.), Suffolk County, Riverhead, N.Y., for respondents.

MEMORANDUM AND ORDER

GLASSER, District Judge:

On March 13, 1967, during his trial for the murder of Ella Mae Carter on February 11, 1986, petitioner Robert Waterhouse withdrew his plea of not guilty and pleaded guilty to second degree murder in full satisfaction of the indictment. On April 28, 1967, the County Court of the State of New York for the County of Suffolk sentenced Waterhouse to imprisonment for twenty years to life. The court sentenced Waterhouse to the same sentence, nunc pro tunc, on October 29, 1969. This procedure

permitted him to appeal from the judgment of conviction, which he did, unsuccessfully. People v. Waterhouse, 38 A.D.2d 1010, 331 N.Y.S.2d 372 (2d Dep't 1972) (mem.), aff'd mem., 35 N.Y.2d 688, 319 N.E.2d 422, 361 N.Y.S.2d 160 (1974).

Waterhouse was paroled in 1975. Some years later, a Florida jury found him guilty of first degree murder in the January 2, 1980 death of Deborah Kammerer. The Supreme Court of Florida affirmed the judgment of conviction and the accompanying sentence of death. Waterhouse v. State, 429 So. 2d 301 (Fla.), cert. denied, 464 U.S. 977, 104 S. Ct. 415, 78 L. Ed. 2d 352 (1983).

Waterhouse is currently incarcerated in Florida and is pursuing a collateral attack on his conviction in that state. His petition for a writ of habeas corpus, 28 U.S.C. § 2254, in this court seeks

vacatur of his New York conviction. Waterhouse is subject to future New York incarceration because the murder of which he was convicted in Florida would constitute a violation of parole. Moreover, the Florida sentencing court found five aggravating circumstances supporting imposition of the death penalty, two of which were "that [Waterhouse] had previously been convicted of second-degree murder in the State of New York, a felony involving violence" and "that at the time of the murder of Deborah Kammerer, [Waterhouse] was on parole from the sentence imposed upon him for the New York murder (and was therefore under sentence of imprisonment)." Waterhouse v. State, supra, 429 So. 2d at 306.

Waterhouse advances three arguments in support of his petition. First, he contends that his New York conviction was

obtained through the use of a coerced confession, in violation of the fifth and sixth amendments. Second, he maintains that his plea of guilty was not made voluntarily and with an understanding of the nature of the charge and the consequences of the plea, in violation of substantive and procedural due process. Third, he argues that he was denied his sixth amendment right to the effective assistance of counsel.

The State of New York responds that Waterhouse failed to exhaust his state remedies on the second and third claims. Because exhaustion is required by 28 U.S.C. § 2254(b) and (c), the State urges the dismissal of the entire petition or, in the alternative, Waterhouse's withdrawal of his unexhausted claims. See, e.g., Holland v. Scully, 797 F.2d 57, 64 (2d Cir.) (upon dismissal of petition for failure to

exhaust some claims, petitioner has option of returning entire case to state courts or deleting unexhausted claims and bringing petition again in district court), cert. denied, ___ U.S. ___, 207 S. Ct. 237, 93 L. Ed. 2d 162 (1986); Petrucelli v. Coombe, 735 F.2d 684, 687 (2d Cir. 1984) (same). In addition, the State contests the merits of Waterhouse's three claims.

For the reasons that follow, the court concludes that Waterhouse has exhausted his state remedies on his third claim --that he was denied the effective assistance of counsel -- and that the claim has merit. Accordingly, Waterhouse's petition for a writ of habeas corpus is granted conditionally.

I. Exhaustion

This court recently observed:

> It has long been settled "that a state prisoner must normally exhaust available state

> judicial remedies before a federal court will entertain his petition for habeas corpus." Picard v. Connor, 404 U.S. 270, 275 [92 S. Ct. 509, 512, 30 L. Ed. 2d 438] (1971); accord, e.g., Harris v. Scully, 779 F.2d 875, 978 (2d Cir. 1985).

Gandia v. Hoke, 648 F. Supp. 1425, 1427 (E.D.N.Y. 1986), aff'd mem., 819 F.2d 1129 (2d Cir. 1987). Typically, unless it is crystal clear that a petitioner has exhausted his state remedies, the State of New York will claim that he has not. But our court of appeals has enunciated a generous standard on exhaustion:

> In summary, the ways in which a state defendant may fairly present to the state courts the constitutional nature of his claim, even without citing chapter and verse of the Constitution, include (a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state cases employing constitutional analysis in like fact situations, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, and (d)

> allegation of a pattern of facts that is well within the mainstream of constitutional litigation.

Daye v. Attorney General of the State of New York, 696 F.2d 186, 194 (2d Cir. 1982) (en banc), cert. denied, 464 U.S. 1048, 104 S. Ct. 723, 79 L. Ed. 2d 184 (1984). The court finds that Waterhouse has satisfied the requirements of Daye.

Waterhouse's claim that he was denied the effective assistance of counsel has two branches. The second branch, which the court does not reach, is that Waterhouse was the victim of bad lawyering in a pretrial hearing and in his appeal to the New York Court of Appeals. The first branch, which the court finds exhausted and meritorious, is that Waterhouse's attorney was disbarred during the pretrial hearing.

The pretrial "Huntley hearing," see People v. Huntley, 15 N.Y. 2d 72, 255

N.Y.S.2d 838, 204 N.E.2d 179 (1965), concerned Waterhouse's contention that his confession was coerced. Waterhouse was represented throughout the Huntley hearing by Edward LaFreniere, who was disbarred on the second day of the hearing. See Suffolk County Bar Association v. LaFreniere, 26 A.D.2d 946, 274 N.Y.S.2d 656 (2d Dep't 1966), motion for leave to appeal dismissed, 19 N.Y.2d 809, 226 N.E.2d 700, 279 N.Y.S.2d 967 (1967). On the same day, the hearing court concluded that Waterhouse "knowingly, intelligently and voluntarily waived his rights and the statement is admissible." Tr. 183.

At trial, which began more than three months later before a different judge, Waterhouse's new attorney, Harry R. Brown, repeatedly requested a new Huntley hearing. The main thrust of Brown's argument was that he should not be bound by the hearing

court's determination, because LaFreniere failed to call a crucial witness. Brown stated: "I want to reopen this on the grounds that it's my opinion that this defendant's constitutional rights have been violated." Tr. 227. Although Brown did not raise the subject of LaFreniere's disbarment explicitly, he did raise a sixth amendment claim when he said that prior counsel failed to call a vital witness and that this violated Waterhouse's constitutional rights.

What is more, when Waterhouse petitioned in April 1969 for a writ of error coram nobis, he raised the question of ineffective assistance by counsel by discussing the disbarment of LaFreniere and his failure to call important witnesses. The attack on LaFreniere's effectiveness continued in Waterhouse's briefs in the appellate division and the court of

appeals. See, e.g., Brief for Appellant at 11, People v. Waterhouse, 35 N.Y.2d 688, 319 N.E.2d 422, 361 N.Y.S.2d 160 (1974) ("[T]he threat of disbarment facing Mr.LaFreniere on the day of the Huntley hearing substantially affected that attorney's representation of the appellant.").

It is true that Waterhouse did not present his sixth amendment claim to the state courts with the same care and thoroughness that he demonstrated in this court. But he gave the state courts a fair chance to decide the sixth amendment claim, and that suffices to satisfy the exhaustion requirement. In light of this court's conclusion that Waterhouse did present his sixth amendment claim to the state trial and appellate courts, the court finds no merit in the State's contention that there was a procedural waiver within the meaning

of Wainwright v. Sykes, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977). Because Waterhouse adequately presented his sixth amendment claim to the state courts, the court turns to the merits of the claim.

II. Sixth Amendment Claim

Twenty years ago, the D.C. Circuit held that the sixth amendment, which guarantees criminal defendants the assistance of counsel, is violated when a defendant is represented by an individual who is not a member of the bar. Writing for the court, Judge Robinson stated:

> Failure to heed the constitutional admonition that the accused enjoy the right to assistance of counsel negates completely the court's jurisdiction to proceed. The proceeding is void, the occurrences therein are vitiated; transpirations otherwise legal go for naught.

Harrison v. United States, 387 F.2d 203, 212 (D.C. Cir. 1967) (footnote omitted),

rev'd on other grounds, 392 U.S. 219, 88 S. Ct. 2008, 20 L. Ed. 2d 1047 (1968). In an opinion by Judge Friendly, the Second Circuit read Harrison as stating a per se rule and adopted that rule. Solina v. United States, 709 F.2d 160, 168 (2d Cir. 1983). Solina had been represented at trial by a law school graduate who was never admitted to practice law. Id. at 162. The district court refused to set aside his conviction because it found the error harmless beyond a reasonable doubt. Id. at 165. Had the Second Circuit applied harmless error analysis, the district court's denial of a motion for a new trial would have been affirmed, because:

> There is simply nothing to suggest that a licensed lawyer for Solina could have arrived at a plea bargain, provided a single juror with a rational basis for having a reasonable doubt, induced the judge to impose a lesser sentence, or prevailed

> upon appeal, and everything to indicate that he could not.

Id.

But, in a characteristically thorough opinion, Judge Friendly concluded that a per se rule was necessary. The court noted that competence was not the sole issue, because Solina's representative was engaging in a crime when he practiced law without a license. "Such a person cannot be wholly free from fear of what might happen if a vigorous defense should lead the prosecutor or the trial judge to inquire into his background and discover his lack of credentials." Id. at 164.

Thus, "assistance of counsel" could mean no less than "representation by a licensed practitioner." Id. at 167. Solina cautioned that the per se rule would not apply when a defendant knew his representative was unlicensed (and thereby

waived his sixth amendment right), id. at 167 n.9, or where the representative belonged to the bar of another state but failed to obtain admission pro hac vice; where the representative merely failed to take the oath of admission or practiced before the formal admission ceremony; or where the attorney failed to pay the dues necessary to his continuation at the bar, id. The per se rule does apply, however, "where, unbeknown to the defendant, his representative was not authorized to practice law in any state, and the lack of such authorization stemmed from failure to seek it or from its denial for a reason going to legal ability, such as failure to pass a bar examination, or want of moral character." Id. at 167 (emphasis added).

In LaFreniere's case, the appellate division found that he had on at least ten occasions accepted fees from clients and

failed to make the necessary efforts thereafter. Suffolk County Bar Association v. LaFreniere, supra, 26 A.D.2d at 946-48, 274 N.Y.S.2d at 656-58. One of the charges sustained against him was that he had received money as escrowee on behalf of a client and failed to account for the missing balance. Id. at 947, 274 N.Y.S.2d at 657-58. Another was that he promised to pay a client's hospital bill out of funds he received in settlement of a personal injury action, but failed to pay the bill or remit any portion of the settlement to the client. Id. at 947-48, 274 N.Y.S.2d at 658. In short, the charges sustained against LaFreniere come within the ambit of Solina's "want of moral character." Indeed, Waterhouse's complaint regarding LaFreniere was that he failed to call available witnesses at the Huntley

hearing, a charge very similar to those sustained by the appellate division.

Additionally, there can be no dispute that the Huntley hearing is a critical stage of the proceedings in state court. The sixth amendment right to counsel attaches as soon as judicial proceedings have been initiated against the defendant. See Brewer v. Williams, 430 U.S. 387, 398, 97 S. Ct. 1232, 1239, 51 L. Ed. 2d 424 (1977); accord Meadows v. Kuhlmann, 644 F. Supp. 757, 761 (E.D.N.Y. 1986), aff'd, 812 F.2d 72 (2d Cir.), cert. denied, ___ U.S. ___, 107 S. Ct. 3188, 96 L. Ed. 2d 676 (1987). In the present circumstances, there probably was no stage of the proceedings against Waterhouse more important than the Huntley hearing, because his confession was so crucial to the State's case against him.

It has been established that Waterhouse lacked counsel during a critical phase of the state court proceedings. The per se rule of Solina therefore seems to end the court's inquiry. There are, however, two arguments for declining to apply a per se rule in this case: (1) In Solina, the defendant's representative was never a member of the bar; here, by contrast, LaFreniere was a member of the bar until the final day of the suppression hearing; (2) Perhaps the per se rule of Solina should be re-examined in light of Strickland v. Washington, 466 U.S. 668, 692, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674 (1984), where the Court held that "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." This court holds that,

under the present circumstances, Solina should not be distinguished or abandoned.

A divided panel of the Ninth Circuit declined to apply a per se rule in United States v. Mouzin, 785 F.2d 682 (9th Cir.), cert. denied, ___ U.S. ___, 107 S. Ct. 574, L. Ed. 2d 577 (1986). Mouzin is similar to this case in that defense counsel was disbarred during the trial but did not cease his representation. Id. at 694. In his majority opinion, Judge Poole expressed concern that the district court was confronted with an unpleasant choice of continuing with the trial (which involved a second defendant) or stopping and "throwing the case into confusion and disarray." Id. The court held that "a defendant must ordinarily point to specific conduct which prejudiced him in order to raise the constitutional claim." Id. at 697. Mouzin distinguished Solina and the D.C. Circuit's

decision in Harrison on the ground that there is a difference between representation by one never admitted to practice and one who is disbarred. Id. Applying a case-by-case, rather than per se, analysis, the court held that there had not been a denial of effective assistance of counsel. Id. at 698.

Judge Ferguson, in dissent, rejected the distinction between a never-admitted attorney and a disbarred one. He reasoned:

> The discipline imposed against the attorney in this case was for failing to protect his client's right to appeal, a classic example of refusing to represent a client's interests. Although [the attorney] proved that he was sufficiently competent to pass a bar exam, he was utterly incapable of representing his clients. Such proven inability as a lawyer is not required to reverse a conviction under the Majority's reasoning.

Id. at 702-03 n.4 (Ferguson J., dissenting). Judge Ferguson urged adherence to Solina and Harrison in the context of disbarment. "When attorney misconduct is so severe as to offend one's sense of justice or is so contrary to the notion of ethical behavior as to completely undermine the trust relationship, reversal of a conviction should be automatic." Id. at 703-04 (Ferguson, J., dissenting).

This court believes that Judge Ferguson's reading of Solina capture's the Second Circuit meaning. Solina included "want of moral character," 709 F.2d at 167, as one basis for application of the per se rule. As discussed above, LaFreniere was found to lack moral character in several respects, all of which showed his unfitness to represent clients. If the per se rule applies to a defendant who receives competent representation from a never-

admitted attorney, it should apply to a defendant who receives any kind of representation from a former attorney disbarred for want of moral character. Not only was LaFreniere adjudged unfit to be an attorney, but -- like Solina's representative -- he would have had some incentive to represent his client with less vigor than the sixth amendment requires. Solina's representative faced a risk, if unmasked, of being prosecuted for the unauthorized practice of law. See id. at 164 & n.6. A similar concern -- compounded by the trauma of his disbarment during the Huntley hearing -- would lead LaFreniere to hold back.

Moreover, even if the Mouzin majority was correct, Waterhouse's case did not present the state court with the unpleasant dilemma faced by the district court in Mouzin. First, there was no co-

defendant in Waterhouse's trial. Second, the state court would not have had to begin a two-month trial from scratch, see Mouzin, supra, 785 F.2d at 685, because Waterhouse sought no more than a new Huntley hearing before his trial commenced. The first Huntley hearing did not fill two days, and this court has no reason to believe that a second suppression hearing -- even if Waterhouse received more vigorous representation -- would have occupied a significantly longer period of time. Ultimately, however, these distinctions of Mouzin are unnecessary to the court's determination, because the court views Mouzin as inconsistent with Solina, and the latter states the law of this circuit.

The second potential reason to reject a per se rule is that Solina might be limited by Strickland, supra. The court concludes that it is not so limited and

remains good law. Three months before the Supreme Court decided Strickland, the Second Circuit reaffirmed Solina's per se rule in United States v. Cancilla, 725 F.2d 867 (2d Cir. 1984), holding that the accused had been denied his sixth amendment rights when he was represented by an attorney who, unknown to the defendant, had engaged in criminal conduct similar to that charged in the indictment.

Indeed, Strickland itself held that "[a]ctual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." 466 U.S. at 692, 104 S. Ct. at 2067. That is precisely what occurred here, because LaFreniere was not an attorney during the second day of Waterhouse's Huntley hearing. The Court has reiterated that harmless error analysis does not apply when an accused is denied the right to counsel,

because this deprivation renders his trial fundamentally unfair. See Pope v. Illinois, _____ U.S.____, ____, 107 S. Ct. 1918, 1922, 95 L. Ed. 2d 439 (U.S. 1987); Rose v. Clark, U.S. ____, 106 S. Ct. 3101, 3106, 92 L. Ed. 2d 460 (1986); cf. Walberg v. Israel, 766 F.2d 1071, 1074 (7th Cir.) (Posner, J.) (harmless error analysis does not apply when defendant is deprived of right to modicum of adversary procedure), cert. denied, _____ U.S. ____, 106 S. Ct. 546, 88 L. Ed. 2d 475 (1985); id. at 1075 (per se rule of Solina and United States v. Hoffman, 733 F.2d 596, 599-600 (9th Cir., 1984), remains valid in wake of Strickland).

In short, Solina is the law of this circuit and governs this case. Waterhouse's New York conviction cannot stand because he was deprived of his sixth

amendment right to the effective assistance of counsel.

III. Conclusion

A writ of habeas corpus, vacating Waterhouse's New York conviction, shall be issued unless the State retries him within sixty days of the date of this memorandum and order. In view of the court's resolution of Waterhouse's sixth amendment claim, it is unnecessary to reach his other two claims. Waterhouse's claim that his guilty plea was not a knowing and voluntary waiver of his rights becomes moot. His claim that his confession was coerced may be dealt with in a suppression hearing before his new trial. This time, Waterhouse will have an opportunity to

seek suppression with the effective assistance of counsel.

SO ORDERED.

s/
United States District Judge

Dated: Brooklyn, New York
May 14, 1987

No. 89/683

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROBERT B. WATERHOUSE,

Petitioner,

vs.

RAMON J. RODRIGUEZ,
Chairman of the New York State Board of Parole, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Sixth Amendment right to counsel is violated where a criminal defendant's licensed attorney is disbarred on the final day of a pretrial hearing for conduct unrelated to that defendant's representation?

2. Whether a federal evidentiary hearing in the context of a habeas corpus petition is mandatory where the state trial court has made findings of fact and law which are supported by the record of the state court hearing?

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TO THE UNITED STATES COURT OF APPEALS
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STATEMENT OF THE CASE

Factual Background

On April 11, 1966, the Suffolk County, New York Grand Jury indicted petitioner for Murder in the First Degree and Burglary in the Second Degree. The charges arose from the brutal sexual assault and strangulation of seventy-six year old Ella Mae Carter in her home. On February 12, 1966, petitioner had provided Suffolk County police detectives

with a written statement in which he admitted being present in Mrs. Carter's home and being involved in an altercation with her at about the time of her death.

On November 14 and 15, 1966, the state trial court conducted a Huntley hearing to determine the admissibility of petitioner's written statement. People v. Huntley, 15 N.Y.2d 72, 255 N.Y.S.2d 838, 204 N.E.2d 179 (1965). Mr. Edward LaFreniere, a licensed New York State attorney, represented petitioner at the hearing. The state court completed the hearing at 12:18 p.m. on November 15, concluded that petitioner's statement was voluntarily made and began jury selection. Mr. LaFreniere was disbarred by order dated November 15, 1966, for misappropriation of client funds and failure to provide representation after accepting fees. See Suffolk County Bar Association v. LaFreniere, 26 A.D.2d 946 (2d Dept. 1966), appeal dismissed, 19 N.Y.2d 809 (1967).

Approximately four months later, on

March 6, 1967, jury selection began for the second time with petitioner represented by court appointed counsel Mr. Harry Brown. Trial testimony ensued and on March 13, 1967, petitioner, on Mr. Brown's advice, withdrew his not guilty plea, and entered a plea of guilty to a reduced charge of Murder in the Second Degree. Petitioner was sentenced to serve a minimum of twenty years and a maximum of life incarceration. Petitioner timely appealed his conviction without success in the New York State courts. People v. Waterhouse, 38 A.D.2d 1010, 331 N.Y.S.2d 372 (2d Dept. 1972); People v. Waterhouse, 35 N.Y.2d 688, 361 N.Y.S.2d 160, 319 N.E.2d 422 (1974). Petitioner was released to parole in 1975.

Subsequent Proceedings

Petitioner was subsequently convicted of another vicious sexually motivated murder in the state of Florida and was sentenced to the death penalty based in part on the prior New York murder conviction. Waterhouse v. State, 429 So.2d 301 (Fla.), cert. denied, 464 U.S.

977 (1983).

On December 19, 1986, approximately nineteen years after his New York murder conviction, petitioner sought federal habeas corpus review of that conviction for the first time in an effort to subvert the Florida death sentence. Petitioner alleged primarily that he was denied his Sixth Amendment right to counsel because LaFreniere had been disbarred on the final day of the Huntley hearing, and that his written statement, which was the subject of that hearing, had been obtained in violation of his Fifth, Sixth and Fourteenth Amendment rights.

The Eastern District Court determined that LaFreniere's disbarment warranted application of the per se ineffective assistance of counsel rule enunciated by the Second Circuit Court of Appeals in Solina v. United States, 709 F.2d 160 (2d Cir. 1983) and granted petitioner's writ. Waterhouse v. Rodriguez, 660 F.Supp. 319 (E.D.N.Y. 1987).

On appeal to the Second Circuit, the

Court of Appeals held that Solina "does not apply to the facts of this case" and remanded the case to the District Court for a determination of the coerced confession claim. Waterhouse v. Rodriguez, 848 F.2d 375 (2d Cir. 1988). On remand the District Court denied petitioner's motion for an evidentiary hearing on the coerced confession claim and dismissed the habeas corpus petition. The Second Circuit Court of Appeals affirmed the District Court's dismissal of the petition by summary order.

Petitioner ultimately gained a reversal of the Florida death sentence in other proceedings and is scheduled to receive a new sentencing phase in the Florida State courts. Waterhouse v. State, 522 So. 2d 341 (Fla.), cert. denied, Dugger v. Waterhouse, 109 S.Ct. 178 (1988).

I. REASONS FOR NOT GRANTING THE WRIT

THE COURT OF APPEALS DECISION ON PETITIONER'S SIXTH AMENDMENT CLAIM IS CONSISTENT WITH THE DECISIONS RENDERED BY THIS COURT AND THOSE RENDERED BY SISTER CIRCUIT COURTS.

It is undisputed that a pretrial suppression hearing is a crucial stage of a criminal proceeding which requires that the defendant be afforded the Sixth Amendment right to counsel within the boundaries established for effective assistance of counsel. See e.g. Strickland v. Washington, 466 U.S. 668 (1984); Powell v. Alabama, 287 U.S. 45 (1932). The case at bar, however, presents a much narrower issue for consideration.

Petitioner was represented at the outset of ~~his~~ Huntley hearing by a licensed attorney who was subsequently disbarred by order entered on the final day of that hearing for reasons not related to petitioner's case. A fair reading of the record reveals that immediately thereafter the proceedings were halted, and the disbarred attorney made no further appearances in petitioner's case. In fact, a new attorney was appointed who represented petitioner from jury selection until the conviction upon his plea of guilty.

Although the United States Court of Appeals for the Second Circuit has enunciated a per se ineffective assistance of counsel rule which it has invoked sparingly to address cases involving egregious conduct such as imposters posing as licensed attorneys, and attorneys engaged in conduct which gives rise to conflict of interests considerations, United States v. Cancilla, 725 F.2d 867 (2d Cir. 1984); Solina v. United States, 709 F.2d 160 (2d Cir. 1983) that court specifically refused to apply the per se rule to the facts of this case. See Waterhouse v. Rodriguez, 848 F.2d at 377.

In accord with the Second Circuit's holding above, the United States Court of Appeals for the Ninth Circuit has also recognized a distinction between those cases where trial counsel was never licensed or admitted to practice law, and was therefore an imposter, and those cases such as the instant case where a licensed attorney is disbarred during the proceedings for conduct not related to those proceedings. The Ninth

Circuit reasoned that:

> "The principle applied in such cases is that one never admitted to practice law and therefore who never acquired the threshold qualification to represent a client in court cannot be allowed to do so, and no matter how spectacular a performance may ensue, it will not constitute 'effective representation of counsel' for purposes of the Sixth Amendment. Conversely, the infliction of discipline upon an attorney previously qualified and in good standing will not and should not transform his services into ineffective assistance." United States v. Mouzin, 785 F.2d 682 (9th Cir. 1986), cert. denied, 469 U.S. 1039 (1986).

Moreover, this Court has demonstrated a reluctance to impose a per se standard or presumption of ineffective assistance of counsel on licensed attorneys, favoring instead the Strickland test which considers the quality of the representation in relation to the outcome of the proceedings. See e.g., United States v. Cronic, 466 U.S. 648 (1984). In Cronic the Court stated that:

> "The right to effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the

> accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." (citations omitted) United States v. Cronic at 658.

Contrary to petitioner's contentions the opinion below in no way conflicts with either decisions of this Court or decisions rendered in the various circuit courts. In an effort to create the appearance of a conflict petitioner refuses to acknowledge the factual distinctions explicitly recognized by the various circuit courts which declined to apply a per se ineffective assistance of counsel rule to cases, such as this one, where a criminal defendant is represented at the outset of the proceedings by a licensed attorney who is subsequently disbarred for reasons unrelated to that defendant's representation.

Petitioner relies upon cases which can clearly be distinguished on the facts: imposters posing as attorneys; cases where no attorney was provided; conflict of

interests cases; and cases involving the issue of waiver of right to counsel.

Finally, we note that petitioner failed below to demonstrate that the actual representation he received at the Huntley hearing falls short of the standards enunciated by this Court in Strickland. Thus petitioner's claim of actual ineffectiveness at the Huntley hearing must also fail.

II. NO FEDERAL EVIDENTIARY HEARING IS REQUIRED WHERE THE STATE TRIAL COURT RECORD SUPPORTS THAT COURT'S FACTUAL AND LEGAL FINDINGS.

Petitioner received a complete and fair evidentiary hearing on the issue of the voluntariness of his confession in the state trial court during his Huntley hearing. The state court made specific factual determinations based on the witnesses and evidence presented by both the prosecution and the petitioner, and determined that the confession was voluntarily made. The trial court's factual determinations were properly afforded a presumption of correctness since

they are amply supported by the record and turn on issues of witness credibility. Miller v. Fenton, 474 U.S. 104 (1985); Townsend v. Sain, 372 U.S. 293 (1963).

Nothing in the record supports petitioner's claim that the courts below failed to focus or make findings on a dispositive issue. The claim petitioner raises concerning being forced to remain naked on a metal chair during two hours of interrogation was specifically raised at the Huntley hearing by petitioner, and specifically denied by the prosecution. The trial court obviously did not credit petitioner's account on this issue since that court specifically stated in its findings at the Huntley hearing that "[Petitioner] was undressed for physical inspection and the presence of a laceration on the inside of his left thigh was noticed." This statement virtually parallels the prosecution witness' testimony on this issue.

Moreover, this Court has held that

although the voluntariness of a confession is a mixed question of fact and law which warrants independent federal determination, subsidiary questions such as "whether in fact the police engaged in the intimidation tactics alleged by the defendant" are factual questions to be decided by the trial court and that court's finding, if supported by the record, is entitled to a presumption of correctness and should be given great consideration by the federal habeas court. Miller, 474 U.S. at 112.

Thus the federal habeas corpus court correctly deferred to the trial court's factual findings and acted properly in denying petitioner a federal evidentiary hearing.

CONCLUSION

FOR THE ABOVE AND FOREGOING REASONS, RESPONDENTS RESPECTFULLY REQUEST THAT THIS COURT DENY THE PETITION FOR A WRIT OF CERTIORARI.

Dated: November 14, 1989

Respectfully submitted,

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No. 89-683

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROBERT B. WATERHOUSE,

Petitioner,

—against—

RAMON J. RODRIGUEZ, Chairman of the New York State Board of Parole, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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November 28, 1989

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REPLY BRIEF FOR PETITIONER

I. SIXTH AMENDMENT

The very cases cited by Respondents demonstrate the conflict between the decision below and prior decisions of this Court. For example, Respondents claim that "this Court has demonstrated a reluctance to impose a per se standard or presumption

of ineffective assistance of counsel on licensed attorneys, favoring instead the Strickland test." (Opp. at 8.)[1] However, Strickland itself recognizes that:

> In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.

Strickland v. Washington, 466 U.S. 668, 692 (1984). Moreover, the only other case cited by Respondents as exhibiting this Court's "reluctance" to employ a per se rule -- United States v. Cronic, 466 U.S. 648 (1984) -- emphatically states that the "presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial,"

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1 Citations to "Opp. at __" are references to the Brief In Opposition For The Respondents," dated November 14, 1989.

and that this "Court has uniformly found constitutional error without any showing of prejudice" in such instances. Id. at 659 & n.25 (citations omitted).

While this Court has not specifically addressed the effect of representation by unlicensed or disbarred counsel, Courts of Appeals, Highest State Courts, and lower courts have addressed the issue. Respondents' contention that the Second Circuit's decision here is consistent with decisions "rendered by sister circuit courts" (Opp. at 5) is inaccurate and misleading for several reasons. First, Respondents disregard the conflicting decisions of several Highest State Courts where the per se rule was applied. See People v. Williams, 93 Ill. 2d 309, 444 N.E.2d 136 (1982); People v. Felder, 47 N.Y.2d 287, 391 N.E.2d 1274 (1979); Seattle v. Ratliff, 100 Wash. 2d 212, 667 P.2d 630

(1980). Further, Respondents' assertion is premised on the mistaken notion that the Second Circuit is the only Court of Appeals that has utilized the per se rule, and then only "sparingly." (Opp. at 7.) While this statement concedes the conflict between the decision below and the decisions in Solina v. United States, 709 F.2d 160 (2d Cir. 1983) and United States v. Cancilla, 725 F.2d 867 (2d Cir. 1984), it also overlooks the conflicting decision of the District of Columbia Circuit in Harrison v. United States, 387 F.2d 203 (D.C. Cir. 1967), rev'd on other grounds, 392 U.S. 219 (1968). Moreover, in the one Court of Appeals case cited by Respondents as being consistent with the decision below, a vigorous dissent was filed regarding that court's decision not to employ the per se rule. United States v.

Mouzin, 785 F.2d 682, 700 (9th Cir. 1986) (Ferguson, J., dissenting).

Respondents' argument that a per se rule is appropriate where representation is by never-licensed counsel but inappropriate where representation is by disbarred counsel trivializes the importance of counsel in our system of justice. There is no principled basis to distinguish between representation by a licensed lawyer who is disbarred for incompetence and dishonesty and one who never passes the bar. Both are prohibited from practicing law because they do not meet the minimum qualifications for representing a client.[2] As Judge Ferguson

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2 Waterhouse does not argue that a per se rule should apply where an attorney is disbarred or suspended purely for technical reasons, such as non-payment of dues. See Johnson v. State, 225 Kan. 458, 590 P.2d 1082 (1979). Unlike here, the discipline imposed in such cases does not call into question the attorney's basic competence and integrity.

cogently explained in United States v. Mouzin:

> The distinction between a never-admitted attorney and a disbarred one makes little sense. The discipline imposed against the attorney in this case was for failing to protect his client's [interests]. Although [defense counsel] proved that he was sufficiently competent to pass a bar exam, he was utterly incapable of representing his clients.

785 F.2d at 702 n.4 (Ferguson, J., dissenting). Judge Ferguson's analysis applies with special force here, where LaFreniere was disbarred for at least ten separate acts of incompetence and dishonesty. Nor is Judge Ferguson alone in reaching this conclusion. State courts, too, have concluded that the per se rule should apply to disbarred counsel. See People v. Williams, 93 Ill. 2d 309, 444 N.E.2d 136 (1982) (per se rule applied where disbarred attorney); People v. Williams, 140 Misc. 2d 136, 530 N.Y.S.2d

472 (Sup. Ct. Queens County 1988) (same).[3]

Finally, Respondents repeatedly assert that, although disbarred "effective November 15, 1966" -- the second day of Waterhouse's Huntley hearing -- LaFreniere never represented Waterhouse after he learned of his disbarment. Even if it were true that LaFreniere had no knowledge of his disbarment -- and there is no record support for such speculation[4] -- that

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3 Application of a per se rule will not affect the conviction of a defendant represented by fully licensed counsel who is disbarred subsequent to the conviction. The Sixth Amendment guarantees representation by properly licensed counsel; it is not a guarantee that in the future such attorney will never suffer a lapse in professional judgment. Thus, where disbarment of an attorney does not have retroactive effect, there is no reason to apply retroactively a per se rule, as long as the accused was represented by counsel licensed at the time of the proceedings.

4 As detailed in the Petition (pages 38-40), there is no support in the record for the claim that LaFreniere was

(continued...)

should make no difference to the imposition of the per se rule. The Sixth Amendment is not designed to regulate the good faith of an attorney but

> "is one of the safeguards determined necessary to insure fundamental human rights of life and liberty," and a federal court cannot constitutionally deprive an accused, whose life or liberty is at stake, of the assistance of counsel.

Glasser v. United States, 315 U.S. 60, 70 (1942) (quoting Johnson v. Zerbst, 304 U.S. 458, 462 (1938)). Thus, whether or not LaFreniere was aware of it, Waterhouse was represented at the crucial Huntley hearing by one who, for substantive reasons of

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4(...continued)
unaware of his disbarment when he represented Waterhouse, which is decisive under the Second Circuit's analysis. Thus, Waterhouse also seeks certiorari for "an initial disposition [of this dispositive fact] in the District Court after an evidentiary hearing." See DeMarco v. United States, 415 U.S. 449, 450 (1973) (per curiam).

incompetence and dishonesty, was found to be unfit to practice law. Considering that the "right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial," Glasser, 304 U.S. at 76, representation by counsel disbarred for incompetence and dishonesty must, in and of itself, be per se prejudicial.

II. HEARING ON COERCED CONFESSION

Respondents utterly fail to confront the application of Townsend v. Sain, 372 U.S. 293 (1963) to the facts of this case, preferring instead to rely on an assumption that the state court judge "obviously" disbelieved Waterhouse's Huntley testimony that he was interrogated for two hours while forced to sit naked on a metal chair. (Opp. at 11.) However, as detailed in the

Petition (pages 41-46), such an assumption is insufficient where, as here, there has been no express finding on a decisive fact; in such instances, Townsend v. Sain requires a federal evidentiary hearing.

CONCLUSION

For the foregoing reasons, and for the reasons in the Petition, we respectfully request that a writ of certiorari be issued to the United States Court of Appeals for the Second Circuit.

Dated: November 28, 1989

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